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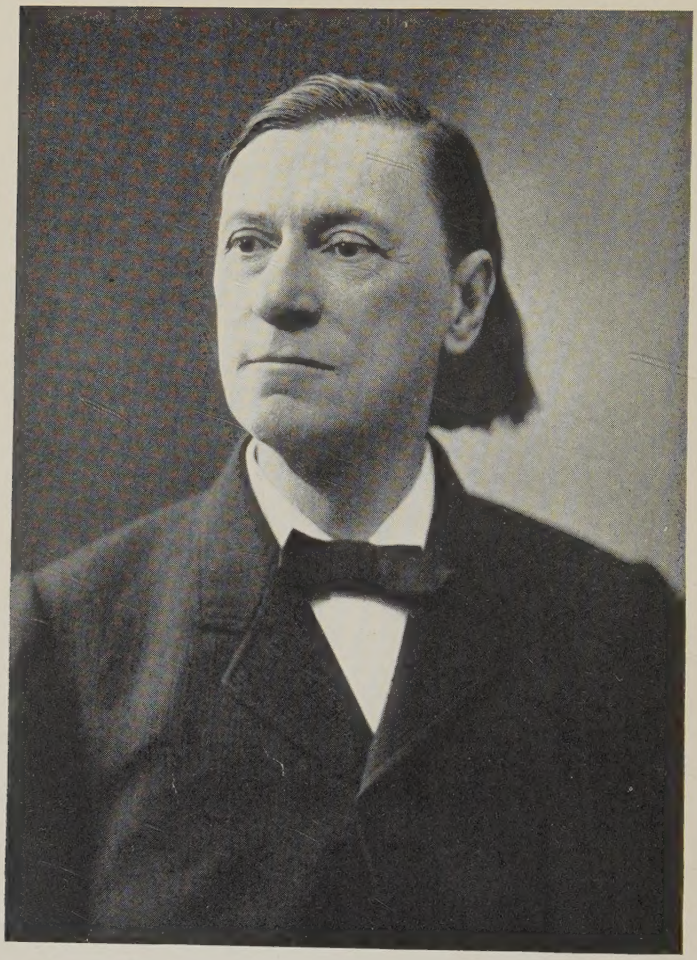

Roger A Pryor.

Frontispiece.

ESSAYS AND ADDRESSES

WITH EXPLANATORY NOTES

BY

ROGER A. PRYOR

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NEW YORK
THE NEALE PUBLISHING COMPANY
1912

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TO THE MEMORY OF

HER

WHOSE INFLUENCE IS

THE INSPIRATION OF THIS BOOK

INTRODUCTION

In my declining days, when "Whether for thought or for action my career is at an end," my mind naturally reverts to the past, and in the retrospect quite as naturally lingers on events in which I myself bore a part, of more or less consequence. To these events the following collection of Essays and Addresses refers; and while intrinsically they are doubtless of little interest, they may be not without attraction to students who find instruction even in the ephemeral effusions of the passing day.

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I

INDEPENDENCE OF THE SOUTH

ESSAYS AND ADDRESSES BY ROGER A. PRYOR: WITH EXPLANATORY NOTES

I

INDEPENDENCE OF THE SOUTH

[Speech on the resolutions reported by the Committee of Thirty-three.]

To-day public interest in the genesis of Secession is attested by the number of books issuing in explanation of that phenomenon. Of course, these publications lack the authenticity and authority of contemporary expositions of their policy by the Secessionists themselves. Among such expositions I may be pardoned for saying that the following speech was recognized by my associates as a correct and comprehensive statement of their cause:—

Mr. Speaker, the resolutions before the House invite discussion of all the issues involved in the present unhappy controversy. The rapid march of events, outstripping the dilatory movements of procrastinating politicians, leaves us no question to consider but the alternative of peace or war. While your committee of compromise have been painfully elaborating plans of adjustment — all "mean reparations upon mighty ruins," — the dispute has become incapable of accommodation; and the results their wisdom was to intercept are now accom-

plished and irrevocable facts. Of the thirty-three States which composed the confederacy at the beginning of this session, six are no longer members of the Union. Not many days will elapse before others will follow their example. Sir, it is an idle and unmeaning mockery to talk of *preserving* the Union; and they who indulge in this strain of declamation betray little of the candor demanded by the urgency of the occasion. In the presence of so tremendous a catastrophe as that which now oppresses us — the overthrow of Government, the partition of a great empire, and the imminent hazard of civil war — we owe it to ourselves and to the country to be done with the expedients of a timid and temporizing policy, and to address ourselves to the emergency without reserve and without equivocation.

The issue before the country, I repeat, sir, is the simple question of peace or war. Acting, as they conceive, from the impulse of abundant provocation, and exerting a power which they derive from the fundamental principles of this Government, the States of South Carolina, Mississippi, Florida, Alabama, Georgia, and Louisiana have renounced the confederacy and assumed the attitude of independent republics. The party into whose hands the control of the Administration is passing, so far from a recourse to conciliatory measures and a recognition of the right of secession, obdurately rejects all overtures of compromise, and avows a purpose to employ all the resources of Government for

the subjugation of the retiring States. And so it is that the calamities of civil war are about to be precipitated upon the country.

Mr. Speaker, in the suspense of this dreadful expectation, the people of the South are sustained by the conviction that, after the passions and prejudices of the moment have passed away, impartial history will acquit them of responsibility for the consequences of the impending conflict. Whenever, in after times, men shall revert to the events of this period, they will curse the madness of those by whom humanity was so deeply wounded; but not upon us will fall their maledictions. In what obligation of confederate duty, I demand, have we of the South been found delinquent? Do we not contribute more than an equal proportion to the support of your Government? Has not Southern statesmanship successfully guided the councils of the Republic in peace? Has not Southern valor gloriously illustrated its arms on the field of battle? To what pledge of confederate faith have we been recreant? Nor is it only in a literal compliance with the obligations of the constitutional compact that the South has exhibited its patriotic fidelity. In our conception something more was exacted by the association of fellow-citizenship; and we have denied the people of the North no facility in trade, and no advantage of policy, which might promote their prosperity. With whose acquiescence, and to whose detriment, were measures of protection enacted for the aggrandizement of your manufactur-

ing interest? Upon the productions of whose industry does your splendid commerce subsist? Until the demon of sectional discord was roused by your invasion of our rights, we willingly bore the burden of unequal tariffs and exclusive bounties, to assist the development of your resources; and your marvelous opulence we contemplated with the pride of fraternal sympathy. In this spirit of unselfish patriotism Virginia contributed a princely domain to the ascendency of the North, little dreaming that the States to be born of her bounty would repay her munificence with more than the ingratitude of Lear's unnatural offspring.

Sir, in what manner have the loyalty and devotion of the South been requited by our confederates of the North? I propound the inquiry in no spirit of vindictive accusation. Indeed, sir, I would despise myself no less than the public would reproach me, if, at this august moment, I should contribute anything to the exasperation of passions already too much inflamed. I advert to the wrongs which the South has endured with no other view than to vindicate the position she has assumed in this controversy. In what manner, I repeat, has the North repaid the fidelity with which the South has redeemed all the pledges of the confederate faith and discharged all the duties of common citizenship?

At the epoch of the Revolution, and, indeed, when the Federal Government was organized, slavery prevailed in the North as well as in the South. If not the chief, it was at least conspicuous among the

interests for the protection of which our present system of Government was established. The Constitution distinguishes it by express and repeated recognition, in each case fortifying it by particular guarantees.

Now, sir, against this great and vital interest — an interest of which the pecuniary value is indicated by countless millions, and the importance of which, in the more essential aspect of social and political relation, no form of expression can adequately represent; an interest on which subsists the material prosperity of the Southern States, and with which their security and independence are inseparably associated,— this interest, so vast and so vital, is the object of organized and incessant assault by those who are bound by every obligation of written covenant and confederate faith to protect it. They have launched against it the anathemas of moral and legal outlawry, and have canvassed Christendom for recruits in the crusade of Abolitionism. They have burdened it with iniquitous and oppressive impositions. They have denied it the development without which it cannot long endure. They have attacked it in detail by every variety of criminal expedient. And, finally, they have essayed, through the instrumentality of servile insurrection, to involve the South in total and irreparable ruin.

These wrongs, I know, appeal in vain to the men by whom they are inflicted; but I can imagine a case analogous in all essential particulars, in the contemplation of which they will not be likely to ex-

hibit so much of insensibility. The manufacturing interest, if not the main, is among the most important of the industrial pursuits of New England. Now, sir, suppose the other States of the confederacy should combine for the spoliation of this interest, and to that end should hold it up to universal execration; should invoke upon it the vengeance of Heaven, and proclaim it beyond the protection of society; suppose they should employ the agency of Government for its destruction, should organize conspiracies to ravage it, and, to impart the last touch of enormity to the outrage, should inflame the passions of your operatives to bloody and incendiary revolt: who believes the people of New England would patiently endure this accumulation of injuries? If they be capable of so abject a submission, they possess not the spirit of those ancestors of theirs with whom the most trivial exaction of illegal power was an insufferable oppression. Yet these and greater grievances are endured by the people of the slave-holding States, but you only mock our complaints and tighten the grasp of oppression. Why marvel, then, that the day of resistance and retribution is come at last?

But, sir, we do not rest the vindication of the South on the slavery issue alone, nor mainly. Our adversaries, availing themselves of the prevalent prejudice against slavery, have diligently represented that the secession of the South has no other object than the perpetuation of bondage; and the effect of the misstatement is visible already in the

unfriendly criticism of the foreign press. It is time our cause were placed upon the true grounds of defense; upon principles which, instead of insulating it from the sympathies of the world, will command respect wherever justice rules and the maxims of republican liberty are revered. True it is that the grievances of which the South complains affect chiefly the interests of slavery; but it is a narrow and unphilosophical view of the controversy to represent the South as protesting only against those grievances. There, indeed, the weight of the oppression is most heavily felt; but its source must be sought elsewhere. We commit an error in reasoning, and what is worse, a blunder in policy, when we confound the practical effect with the radical principle of tyranny. If we mean to apply the resources of true statesmanship to the disorders of the country, we must discover and correct the organic derangement of the system; otherwise all our pretentious prescription is but the quackery of the empiric.

Sir, for fifty years the interests of the South reposed and prospered under the sacred safeguards of the Constitution. By that compact the equality of the States was guaranteed, their right of self-government recognized, and each member of the confederacy mutually pledged to the others in a spirit of fraternal alliance. The States of the South acceded to the Union on these conditions; on the conditions that they were to be the peers of their sovereign associates, that their rights were to be in-

violable, and their property secure under the protection of the common Government. This sacred covenant was the bond of union between the confederate Republics. The Constitution imposed reciprocal obligations on the States, and pledged them to mutual offices of good-will. In what manner are these pledges redeemed, and these obligations fulfilled, by the Northern States?

Foremost in the catalogue of Southern grievance is the complaint that the fundamental principle of the confederacy, the quality of the States, is subverted by a combination between a majority of States to exclude other States from an equal participation in the common domain, and so to deny them equal advantages of expansion and development under the operation of the Federal Government. Nay, this Government itself is abused to the consummation of that iniquity.

To all candid men I appeal, if this single fact of the exclusion of the South from any share and enjoyment of the joint territory of the States does not involve every circumstance that can rouse the indignation of freemen — a breach of constitutional compact; a stigma of inferiority; a principle of civil disability; and a measure of practical oppression. In private life individuals resent no grievance sooner than an invasion of their rights of property. Among nations an encroachment on their territorial possessions is an affront which war alone can redress. But the exclusion of the South from the common domain of the confederacy, besides these

circumstances of insult and aggression, implies a breach of the most solemn stipulation and a reflection the most offensive on the Southern character. For you cannot deny the South equal rights in the Territories without subverting the principles of the Constitution; and in justification of this wrong the social system of the South is denounced as the "sum of all villainies." What other or greater grievance need the South urge in vindication of its conduct?

But this is not all. In respect of another essential condition of federal union — the guarantee of State sovereignty, the right reserved by each State to administer its own affairs and to develop its own destinies in harmony with the general interests of the confederacy — whatsoever of this right may have survived the systematic encroachments of Federal usurpation has vanished before the threat of military coercion. Already sovereign States are reduced, in contemplation, to the condition of provincial dependencies; and that doom they would speedily realize but for the indomitable spirit which quails not before all the "pomp and circumstance" of your martial preparation.

Perhaps even these radical violations of the Constitution in its spirit and essence you may repel as the vague refinements of a temper alert to discover material of sectional crimination. Let us descend, then, for a moment to a single instance in illustration of the perfidy by which the South is defrauded of its covenanted rights. An explicit provision of the constitutional compact exacts the restitution of

fugitive slaves; yet that provision — albeit so essential that, without it the South originally refused to join the confederacy — is shamefully annulled by the Northern States; and by the default millions of Southern property have been confiscated. So flagrantly has the South been cheated of its constitutional rights and denied the advantages of the Union — all the burdens of which, however, it bears in enormous disproportion!

What stronger argument than this, of violated faith and broken engagements, of the invasion of chartered rights and the usurpation of forbidden power, can be required in vindication, if you please, of revolutionary measures? All writers except the partisans of divine right and passive obedience are agreed that an infraction of the implied contract between sovereign and subject absolves the latter from his allegiance. It is this principle of constitutional liberty which distinguishes the great rebellion and the revolution of 1688 as the most glorious epochs in British history. Say, then, is there less obligation in a solemnly ratified and written compact than in a tacit and disputed engagement; and are sovereign States denied a redress which the genius of free government guarantees to individuals?

But the defense of the South rests upon still stronger grounds; and her secession from the confederacy is justified by even higher principles than the right to vindicate a violated covenant. Absolute power is the essence of tyranny, whether the

power be wielded by a monarch or a multitude. The dominant section in this confederacy claims and exercises absolute power — power without limitation and without responsibility; without limitation, since all the restrictions of the Constitution are broken down; and without responsibility, because, in the nature of things, the weaker interest cannot control the majority. Of all species of tyranny, the South is subjected to the most intolerable. Under the rule of a despot we might hope something of his impartial indifference between the sections; but to be exposed to the unbridled sway of a majority, adverse in interest, inimical in feeling, and ambitious of domination, is to be reduced to a condition more abject than that of the slaves whose emancipation is the pretext of all this controversy.

It is against this sectional domination, this rule of the majority without law and without limit — a rule asserted in subversion of the Constitution and established on the ruins of the confederacy — it is in resistance to this despotic and detestable rule, that the people of the South have taken up arms. This, Sir, is the cause of the South; and tell me if cause more just ever consecrated revolution? It is the cause of self-government against the domination of foreign power — the very cause for which our fathers fought in 1776. Sooner than submit to the irresponsible rule of alien interests, they tore themselves from the embrace of the mother country and staked all in the triumph of *secession*. Washington and Jefferson were the most illustrious of

secessionists; and we of to-day are but walking in the light of their glorious example. They held it unworthy of freemen to bear the burden of arbitrary imposition; and they were not conciliated by the deceptive tender of partial representation in the British Parliament. The South has her Representatives in this Capital; but their voice is of no avail against the Northern majority. She is taxed not with her own consent, but by the votes of delegates whom she cannot control.

I repeat, it is against the rule of a sectional despotism that the South demands protection; and it is to assert the cause of civil liberty that she declares her independence. You of the North lavished your sympathy on the people of Hungary in their revolt against Austrian absolutism; but our cause is identical in principle and in purpose. At this moment, while you bestow admiration and applause on the revolutionists of Italy, I would remind you that the people of the South are moved by the same impatience of alien ascendency and the same aspiration for self-government which, after ages of slumber, have at last awakened the Italians to a recollection of their long-lost liberties.

The cause of the South solicits recognition and regard by yet another consideration — by a consideration which appeals to the interest of every section.

To-day it is slavery which suffers from the overthrow of constitutional guarantees and the irresponsible reign of the majority. But, the principle

of absolute power once ascendant in the Government, no interest is secure; and circumstances will determine against what object it may be directed. If, in contravention of the compact of union, slavery may be oppressed by Federal action, the navigation of New England or the iron interest of Pennsylvania will be exposed to the same ruin whenever they shall incur the displeasure or invite the rapacity of other sections. The only safeguard of American liberty is in maintaining the integrity of the Constitution and preserving intact the limitations of the Government. For that the South contends; and all are alike concerned in the success of her cause.

If, after the endurance of so many wrongs, and the menace of others still more intolerable, anything were wanting to justify the South in the public opinion of the world, it would be supplied by her solicitude to avoid violence and redress her grievances within the Union. We are reproached, I know, with precipitancy in not awaiting an *overt act* of hostility from the sectional Administration. Sir, in our judgment a proclamation of war is an overt act; and such proclamation we find in the election, by an exclusively sectional vote, of a President pledged to put our rights and our property "in course of ultimate extinction"— a President who admonishes us in advance of his aggressive designs by the sententious but significant declaration, that "they who deny freedom to others do not deserve it themselves, and, under a just God, cannot long

retain it." We could not agree to await inactively the development of the disposition of the President-elect; for we claim to hold our rights by some higher and more solid tenure than the capricious temper of any individual. Indeed, the argument of our opponents involves a concession of our case, inasmuch as it implies that the rights of the South are no longer secured by constitutional guarantees, but are suspended on the accident of an unfriendly Administration.

A more imperative consideration still determined the South to act at once, and to act decisively. If negotiation might avail, we thought to strengthen negotiation by a demonstration of our spirit. If the sword alone can reclaim our rights, we were resolved not to be unprepared for the issue.

Mr. Speaker, since the fatal 6th of November to the present hour, the Representatives of the South have invariably exhibited an accommodating disposition. The first day of our session was signalized by a proposition from a colleague of my own (Mr. Boteler), which contemplated a pacific adjustment of our difficulties. A similar movement, likewise originating with a Southern man, was initiated in the Senate. Meanwhile various schemes of settlement have been submitted in one or the other House of Congress, of which, without much regard to their intrinsic efficacy, we have uniformly avowed our support; while on the other side they have been as uniformly rejected with a contemptuous disdain of compromise. Thus while the South

is willing to remain in the Union with an assurance of its rights, the North declares, by a refusal of all concession, that it will destroy the Union rather than renounce its aggressive designs. In the perverted patriotism of the dominant party the Constitution of Washington is substituted by the platform of Lincoln; and rather than be reproached with logical inconsistency, it chooses to incur the guilt of civil war.

And not in the negative sense of rejected compromise only, does this party betray a purpose to push the dispute to the arbitrament of the sword. Instead of a proclamation of conservative policy that should give assurance of peace to a distracted country, their leader announces that his Administration is to be directed by the counsels of the champion of the "irrepressible conflict." Instead of the sense of justice and the patriotic spirit which, we were told, still animate the masses of the Northern people, Northern legislatures vote men and munitions of war to chastise the resistance roused by their own perfidious violations of a constitutional covenant. And here, while with the one hand Republican Representatives spurn all overtures of peace, with the other they grasp the sword. No measure of conciliation will they pass; their energies are engrossed in contriving schemes of coercion. Day after day develops the completeness of their system of force. Now it is a bill denying South Carolina the facilities of postal communication; anon a bill for the compulsory collection of the revenue at Charleston.

In the South frowning fortresses threaten the subjugation of sovereign States; in this District a hireling soldiery are concentrated to impose an obnoxious ruler on an unwilling people. Auspicious inauguration of a Republican President! Happy presage of a liberal Administration! If the conclusion be but consistent with this encouraging commencement, no doubt the next four years will reconcile the South to the rule of the dominant party.

In aggravation of circumstances themselves sufficiently exasperating, the rumor, too monstrous for belief, that all these measures of coercion against the South are stimulated and directed by a son whom the South has delighted to honor, in proportion even to his own conceit of his own merit, imparts a tone of deeper indignation to the murmurs of an outraged people.

Thus, Mr. Speaker, by a series of aggressions of which I have attempted nothing more than an imperfect sketch, the dominant party in the North have effected that which the world in arms could not have accomplished — the overthrow of this once glorious confederacy. And not content with an achievement that will burden their memory through all coming ages, they now purpose to consummate their work by afflicting the country with the calamities of civil war.

Mr. Speaker, we of the South maintain that among the fundamental and essential articles of the republican faith is the doctrine that the States, having subscribed the constitutional compact on their

own independent volition and in the exercise of an inherent sovereignty, have the right, perfect and inviolable, to renounce the Union whenever, in their judgment, the Constitution is annulled and the Union abused to their oppression. Nay, in the very act of assent to the league of confederation, Virginia and other States, by express stipulation, reserved to themselves the right to resume their original sovereignty whenever, in their opinion, the conditions of alliance might be violated. As we understand it, this is an association of co-equal sovereignties, held in fraternal embrace by the sweet influences of reciprocal confidence and regard; not a system of reluctant and oppressive connection bound together by the fetters of Federal force. Nor have the people of the South contemplated the right of secession as a vain speculative proposition, but have cherished it as an actual and inestimable muniment of republican liberty. It is precisely in this particular that the citizens of the United States have the advantage of the people of all other countries; in that, when the checks and balances of the central government are overthrown, there remains the rampart of State sovereignty behind which they may rally and maintain their rights; and in the still more important particular that, through the instrumentality of secession, they may recover their liberties by the organic operation of the system without recourse to the dreadful extremity of revolution.

These principles, it appears by too many distressing indications, are not prevalent in the councils of

the dominant party. Their cry is for coercion. They present the South no other alternative than submission or subjugation. Sir, it is no easy effort to debate an issue of this sort; and the impulse of a gallant people is to answer menace by defiance. But we owe it to the solemnity of the occasion to repress every ebullition of resentment, and to discuss even an offensive topic in a spirit of moderation.

What, then, I would entreat of gentlemen on the other side, do they purpose by kindling the flames of civil war? No matter what may be the issue, liberty cannot survive the conflict. The frail fabric of a system constructed for the abode of peace would perish under the shocks and concussions of intestine strife. An armed encounter between the States would be fatal to a Constitution designed to hold them in amicable association; and your Union would go down with the principle of mutual consent on which it reposes. He must be inattentive to the plainest lessons of history who does not foresee that from a bloody struggle among the States — *bellum plus-quam civile* — either anarchy would emerge to brood over the land with desolating presence, or else military violence would assert its iron sway. What though the fortune of war be propitious to your arms? You must be content with nothing less than the annihilation of the South; for, while she breathes, the impulse of honor will throb in her bosom and urge her to still further resistance. Recollect the story of Ireland's wrongs and Ireland's emancipation. The remorseless con-

queror doomed her to desolation; but fate reserved her as a dependent province of the British Empire. How, as a thorn in England's side, she avenged herself on the tyrant, and at last extorted from his fears the recognition of her rights, your intelligence needs not to be instructed. And so would your difficulty be our opportunity.

Imagine, then, for a moment the complete subjugation of the South; after every spark of vitality is extinguished, and her inanimate form lies prostrate before you, tell me, what recompense do you gain for all your sacrifices, or what consolation in the tormenting memory of your fratricidal deed?

But I dismiss the humiliating thought. No matter what her inferiority of force, you cannot subjugate the South. Smitten she may be, but not subdued; defeated, but never dismayed. Already, by her determined and defiant attitude, she gives you earnest of the spirit that will animate her sons in the hour of trial. From many memorable examples of heroic resistance to wrong they derive the consolatory assurance that a brave people battling for the right are invincible against any odds. Nine million of freemen — and heed not, I admonish you, the treacherous suggestion that the South will not oppose a united front to the foe — nine million of freemen, of a race the most energetic and indomitable recorded in history, glorying in traditions of ancestral prowess, and attached to the cause of liberty with a chivalric devotion — this people, themselves distinguished for valor and the genius of

war, contending on their own soil for whatever imparts a felicity to life — this people will laugh to scorn all the imposing array of your military preparation.

Not for themselves, then, do they deprecate a conflict of arms; but from respect to the memory of our common ancestry; for the sake of a land to be rent by the cruel lacerations of the sword; and in reverence of virtues a benign religion instructs them to adore. By the persuasion of these pious and pathetic importunities we would soothe in every breast the spirit of strife and invoke the pacific intervention of reason for the adjustment of our disputes.

And what, I pray you, is the dictate of reason? Not, surely, that a free people should be held in subjection to a government they detest; not that the sword be employed to coerce sovereign States, and constrain them to wear the yoke of an odious and oppressive association; but rather that distinct communities be permitted to follow the bent of their peculiar nationality, and to realize the destiny indicated by their own interests and their own aspirations. You of the North hold in your grasp the elements of a great empire — a teeming population, immense resources, and a daring energy of genius which surmounts all obstacles, and dazzles the world with its exploits. For our part, in slight esteem as you affect to hold the South, we are content with our portion. Whensoever occasion shall require — and occasion does now demand it — we

are prepared to assert our equality among the sovereigns of the earth, and to make good the claim against all comers.

Instead, then, of vainly essaying to counteract the designs of nature, let us heed the voice of reason; instead of lamenting the rupture of an artificial tie, as involving the ruin of all our hopes, let us lean on the wisdom of Providence, persuaded that as He has already distinguished the epoch of Revolution as the most glorious in the annals of America, He intends still farther to advance the cause of freedom and civilization by means of another dissevered nationality.

II

THE SUFFICIENCY OF THE NEW AMENDMENTS

II

THE SUFFICIENCY OF THE NEW AMENDMENTS

JUDGE TOURGEE in the March [1890] issue of the *Forum* challenges the efficacy of the recent Constitutional Amendments to accomplish the results they were designed to secure, namely, the integrity of the Union and the protection of the colored population. That the essay was not a mere academic disputation, but was inspired by a serious purpose and contemplates important objects, the writer, if he does not frankly avow, yet plainly betrays. But whatever the motive of the argument, its obvious tendency is to excite the apprehensions of all who are solicitous for the stability of the Union, and to agitate eight million colored citizens with anxiety for the security of those rights which they had supposed to be guaranteed them by the provisions of the amended Constitution. To quiet these alarms, and to confirm conviction of the sufficiency of those enactments for the great ends to which they are directed, is the purpose of this contribution.

Before proceeding to a consideration of Judge Tourgée's specific criticism of the Amendments, it is important to observe a radical modification which they have effected in the relations of the national Government to the people of the United States.

Prior to the adoption of the Amendments, the essential rights and liberties of the people had no other safeguard than the guarantees of the State Constitutions. The earlier Amendments of the Constitution were limitations only upon the action of the Federal Government, and imposed no restraint on the States in their relations to the people. Excepting the prohibition of bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts, the States were left absolutely free to define and regulate the people's rights. Now, it is conceivable that passion and prejudice and sinister interest might so prevail in a particular State, or in particular States, as to induce an abrogation of the securities of civil liberty, or, at all events, such a judicial construction of those securities as would render them nugatory. But by operation of the new Amendments all the essential rights and liberties of the people are taken under the protection of the Federal government, and are guaranteed inviolability as against the States and any of their agencies.

1. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." [1] Judge Tourgée complains that here is no definition or enumeration of the "privileges and immunities of citizens," and that hence they stand insecurely upon mere judicial construction. But certainly it was a politic caution to abstain from such definition and enu-

[1] Constitution, Article XIV., Sec. 1.

meration, lest perchance some precious right or liberty should inadvertently escape mention and fail of protection. Already "judicial construction" has ascertained and declared that these privileges and immunities are those which "belong of right to the citizens of all free governments"; that they embrace all the fundamental rights of freemen; that they include every right within the comprehensive formula of the Declaration of Independence—the right to "life, liberty, and the pursuit of happiness." To ascertain what those fundamental rights of freemen are which the clause in discussion places under the guardianship of the national Government, we need only to recur to the earlier Amendments of the Constitution. As first propounded, the Constitution contained no bill of rights, no reservation of individual right from the scope of governmental action; but, in deference to the demand of the people, the defect was promptly repaired. Surely, then, those rights which the earlier Amendments of the Constitution were devised and adopted to secure fall within the category of "fundamental rights of freemen," else they would not have been so anxiously consecrated and conserved by the fundamental law of the nation. Reverting to the rights so distinguished and protected from infringement, we find that among others are included these: freedom of religion, of speech, and of the press; security against unreasonable searches and seizures; the right of a speedy and public trial by an impartial jury; exemption

from self-accusing evidence; immunity from arbitrary invasion of person or property. All these rights now stand inviolable under the guaranty of the Federal Government.

2. "No State shall deprive any person of life, liberty, or property without due process of law." Quite unaccountably Judge Tourgée omits this provision in his enumeration of the "constitutional advances" made by the new Amendments. Surely he does not consider this safeguard against the arbitrary encroachment of the State upon the rights of person and property as of too trivial significance to be noticed, for of all the securities to the people provided by the new Amendments none is of wider scope or farther-reaching consequence. Previously to its enactment, nothing stood between the State and the lives, liberties, and property of its citizens save its own volition embodied in an organic law which it might change at will; but now any invasion of the rights of person or property, except "according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property," is forbidden to the States; and the nation, with its almighty power, stands between the victim and the aggressor. Nor can the State evade the restriction by a procedure devised for the purpose, for "a statute passed for working the wrong is not due process of law." [2]

3. "No State shall deny to any person the equal protection of the laws." By this provision the

[2] Bronson, J., in Porter v. Taylor, 4 Hill, 140.

equality of all persons before the law is recognized and enforced by the Federal authority; and the State, in the distribution of the benefits and the imposition of the burdens of government, will not be suffered to discriminate adversely to the rights of any man or class in the community — to administer one law to the poor and another to the rich, one law to the white man and another to the negro. The beneficial operation of this guaranty has already been displayed, in protecting corporations from unequal exactions, in shielding Chinamen from hostile discrimination, and in securing the negro an impartial jury on his deliverance from criminal accusation.

Thus it is that now the freedom and the security of the American people are protected by a twofold panoply — the safeguard of the State and the safeguard of the nation. If the new Amendments had no other or further effect, this alone would challenge for them the grateful homage of the people. But the crowning glory of the new Amendments remains yet to be signalized. By Article XIII slavery, of whatever name and in whatever guise, was effaced forever from the soil of America; and by the first section of Article XIV, citizenship — State as well as national — was made the birthright of the negro. Thus by these beneficent and ever-memorable enactments five million human beings were set free from bondage and invested with the plenitude of citizenship in the imperial republic of the world; and by a caprice of retributive

justice the court which had just declared them incapable of civic rights was made the sanctuary of their liberties.

So far the Amendments seem entirely adequate to the ends for which they were designed. But Judge Tourgée affirms them to be defective still in two essential particulars. First, he says:

"The doctrines of the paramount prerogative of the State and the paramount allegiance of the citizen to the State, are said to have been 'settled by war.' These doctrines are not even yet obnoxious to any constitutional inhibition. Their correlates, secession and nullification, are not punishable offenses, nor even constitutionally-negatived theories. The doctrine of State sovereignty rests to-day upon precisely the same legal basis that it did one hundred years ago. . . . To some this will seem, perhaps, a surprising fact."

Not to "some," but to all, and not "perhaps," but certainly, it is a surprising revelation that so much blood and treasure have been expended to no purpose; that so many heroic lives have been offered in a useless and, because useless, a wicked sacrifice; that the wisdom and virtue of statesmen have been exerted in vain to consolidate the Union on the stable basis of constitutional authority; and that, after all, secession and nullification are still vital and operative principles in our political system. For one, at all events, I reject this cynical

estimate of the results of the mighty struggle. For one, I hold that secession and nullification, as potential facts, were annihilated by the stroke of war, and that as principles they no longer find shelter or pretense of justification in the theory of our government.

The occasion of Judge Tourgée's pessimistic outcry is the omission from the new Amendments of any explicit negation of the right of secession. But here was another wise and politic abstention on the part of the statesmen who reconstructed the Union. A direct and formal denial, in the new Amendments, of the right of secession would imply a necessity for such denial; and the necessity of such denial would involve the admission that otherwise the right did exist; and this admission would carry with it the implication that, after all, the Confederacy had reason and right on its side. And if so, then the war on the part of the North was an iniquitous crusade against a people contending only for their chartered rights. But the statesmen of that day were too sagacious to commit themselves and the nation to so self-stultifying a conclusion.

Nor, indeed, was any explicit challenge of the principle of secession necessary to its exorcism from our system of government. The case was this: the Confederates affirmed the right of a State to withdraw at will from the Union, and denied the right of the nation to coerce them back into the Union; the nation denied the right of secession,

and asserted its right to compel a State to remain in the Union. Upon this issue the battle was fought, with the result that, in point of fact, the asserted right of secession proved to be nothing more than an idle claim incapable of enforcement, and fraught with the most frightful calamities to the party advancing it. That the right of secession, whatever its validity in abstract speculation, is no longer a practical principle in American politics, and will never again be asserted as the ground and justification of separation from the Union, has been definitely settled by the most decisive of all adjudications — the dread arbitrament of war. Power is a surer guaranty than paper.

And yet the new Amendments do negative the right of secession by implication, that is, by abrogating the fundamental principle of the former federal system, and by substituting a principle with which paramount State allegiance and, so, the right of secession are utterly incompatible.

As the original Articles of Confederation constituted only a league between the States, citizenship of the so-united States was a thing inconceivable; and accordingly the only citizenship then possible as a legal fact was citizenship of the State. National citizenship was introduced for the first time into the American polity by the Constitution of 1787. But national citizenship under that Constitution was not primary and paramount, but secondary and subordinate. National citizenship was only an incident of State citizenship; one was

a citizen of the Union because, and only because, he was a citizen of a State.

"Strictly speaking, there were no citizens of the United States, but only of some one of them." [3] "Under the Constitution [of 1787], citizenship of the United States, in reference to natives, was dependent upon citizenship in the several States, under their Constitution and laws." [4] "No man was a citizen of the United States, except as he was a citizen of one of the States." [5] "Every citizen of a State is *ipso facto* a citizen of the United States." [6]

Since, then, citizenship of the State was the primary and paramount citizenship, and citizenship of the United States only derivative and dependent, the logic of secession deduced the conclusions, first, that allegiance to the State was primary and paramount, and allegiance to the United States only secondary and subordinate; and, secondly, that on occasion of conflict between these diverse allegiances, allegiance to the State imposed the greater and the more imperative obligation. Hence the doctrine of the right of secession.

But by the new Amendments all this is changed. The principle is inverted. Allegiance to the Union is made the primary and paramount allegiance, im-

[3] Shannon v. Hill, 26 Federal Reporter, 343.
[4] Slaughter-house Cases, 16 Wallace, 94.
[5] Id., 72.
[6] Story on the Constitution, Sec. 1693.

posing the greater and the controlling obligation; and allegiance to the State is degraded to a derivative and dependent allegiance, imposing no obligation in competition with the original and supreme allegiance. "All persons born or naturalized in the United States are citizens of the United States and of the State in which they reside." [7] Thus, citizenship is created by the Federal Government, and prescribed by it to the State. Accordingly,

"A citizen of a State is now only a citizen of the United States residing in that State." [8] "Citizenship of the United States is the primary citizenship; State citizenship is secondary and derivative, depending upon citizenship of the United States." [9]

Thus, by the new Amendments the fundamental postulate of secession and nullification, namely, the supremacy of the State citizenship and State allegiance, is destroyed, and in its stead is substituted the contradictory principle of the supremacy of national citizenship and national allegiance — a principle which necessarily involves negation of the right of secession and nullification.

By another provision of the new Amendments still another implied but emphatic protest against the right of secession protects the integrity of the Union. The first section of Article XIV forbids a State to abridge "the privileges or immunities of citizens of the United States." But the assump-

[7] Amendments, Article XIV., Sec. 1.
[8] Slaughter-house Cases, 95.
[9] Id., 112.

tion that a State may leave the Union at will necessarily involves the admission that a State may not only "abridge" but abolish the "privileges and immunities of citizens of the United States"; for manifestly no federal privilege or immunity can attach to a community not in the Union.

Even more decisive against the hypothesis that secession may still consist with the Constitution, is the provision by which Congress is armed with plenary power to enforce all the guaranties of the new Amendments. By this provision the nation assumes supremacy and sovereignty over the States; and unless a right to coerce a State be compatible with the right of a State to secede, this provision annihilates secession.

Suffer me to deduce, as a corollary from the foregoing argument, a hope that Judge Tourgée's imagination will be no longer affrighted by the phantom of secession.

But, secondly, Judge Tourgée's chief criticism of the new Amendments is directed against the provisions affecting the elective franchise; and he expends much labor in an effort to show that they are altogether insufficient as a guaranty of suffrage to the negro. Indisputably, if their object was formally to confer the suffrage upon the negro, these Amendments have miscarried in their design, although in effect they may in a certain predicament invest him with the elective franchise.[10]

In readjusting the relations of the Government

[10] *Ex parte* Yarborough, 110 U. S., 665.

and people after emancipation, it was as competent to the nation to make the negro a voter as to make him a citizen; but such degradation of the States, by depriving them of the distinctive feature of autonomy, namely, the right to create and qualify the electoral body, was not in the minds of the framers of the new Amendments, who even in that tremendous crisis adhered tenaciously to the characteristic principles of the federal system. They plainly desired that the newly-enfranchised class should be invested with the suffrage; but they recognized that, in conformity with the genius of our institutions, the right to vote was within the gift of the State, and not of the United States. So, by the second section of the Fourteenth Amendment, the most persuasive argument was employed to induce the States to confer the elective franchise on the negro, namely, the provision that if he be not a voter he shall not be a constituent of representation. It being apprehended, however, that not even the aggrandizement of their political power would avail alone to move the Southern States to bestow the suffrage on the negro, the nation, then, by the Fifteenth Amendment, forbade any discrimination against him in conferring the right to vote. Further than this the new Amendments do not guarantee the elective franchise to the negro. Is this guarantee sufficient? Judge Tourgée contends that it is not; I affirm that it is.

The interdict in the Fifteenth Amendment against denying or abridging the right to vote on

account of race or color, not only prevents the absolute disfranchisement of the negro, but insures him also an equality of electoral capacity; for a prescription of different qualifications involves necessarily an abridgment of the right to vote of the race upon whom the more onerous condition is imposed. Hence the fact that in every State of the Union the black man is a voter, and a voter upon precisely the same conditions as are prescribed for the white man.

But, it is said, the States may deprive the negro of the suffrage. So likewise may they deprive the white man. Nay, so *must* they deprive the white man, for under the Fifteenth Amendment no disqualification can be applied to the black man that is not equally operative against the white; and, conversely, whatever qualification is conferred on the white man, *ipso facto* operates to make the negro a voter.[11] The States can disfranchise the negro not otherwise than by disfranchising at the same stroke the white man. Any enfranchisement must embrace both classes equally and alike; any proscription must include both classes equally and alike. Again, any disfranchisement of the negro by a State reduces proportionally its political power — its vote in the House of Representatives and its vote in the Electoral College. That the South should so sacrifice its influence in the government is an event that has not happened, and that, we may be sure, will not happen. And still more incon-

[11] *Ex parte* Yarborough, *loc. cit.*

ceivable is it that, in order to disfranchise the negro, the white men of the South will voluntarily disfranchise themselves.

Thus, by the conjoint effect of these two provisions in the new Amendments, the negro is abundantly guaranteed in the enjoyment of the elective franchise.

But Judge Tourgée propounds a construction of the Fifteenth Amendment which, if tenable, would indeed arm the States with power to withhold the suffrage from the negro; and it is that construction which inflames him with indignation and alarm for the imperiled rights of the colored people. The language of the Amendment is: "The right of citizens of the United States to vote shall not be denied or abridged on account of race," etc. In his exposition of the sense of these words the learned commentator assumes that "the term 'right to vote' means the vested right of a duly qualified voter"; that one who "has never possessed the right to vote has not a right to vote which can be denied or abridged." And from this postulate he deduces the inference that the only operation of the Fifteenth Amendment is to prevent the deprivation of an already enfranchised voter — to hinder the taking away of what the citizen has; but that the provision is utterly ineffectual to prevent withholding the suffrage from any one in whom it is not actually vested. In other words, the proposition is that while the Fifteenth Amendment disables a State to disfranchise existing voters on account

of race, etc., the State is not restrained from refusing to confer the suffrage on a negro in whom it is not already vested. That I am not gratuitously imputing to Judge Tourgée a far-fetched and fantastic conceit is demonstrated by his own explicit affirmation of power in a State "to provide that, on and after a certain date, only *white* males should become voters on arriving at the age of twenty-one years." Surely, no argument can be necessary to exhibit the absurdity of this proposition. Its basis is a verbal quibble as strained and fanciful as that by which in former days a certain Abolitionist essayed to prove that the Constitution forbade restitution of fugitive slaves: "No person held to service or labor in one State, escaping into another . . . shall be delivered up." If the provision were that no citizen shall be *deprived* of the right to vote, there might be some plausibility in the contention; but as it is the *denial* of the right that is prohibited, such prohibition is violated whenever concession of the right is refused. Indeed, Judge Tourgée himself admits that the purpose in the adoption of the Amendment was "to provide that a colored man should, in every State and for all time, be entitled to become a voter upon the same terms and conditions as the white man"; and the words employed are apt and efficient to accomplish the purpose.

Whether Judge Tourgée intends modestly to suggest a doubt as to the validity of his contention, or means rather to claim the merit of originality

for his discovery, he admits that "the view now presented has not been taken by juridical writers."

It is said above that, under certain circumstances, the effect of the Fifteenth Amendment might be to confer the elective franchise on the negro; but even then, that effect is dependent upon the volition of the State. The language of the Amendment is merely negative — not bestowing suffrage, but only forbidding a deprivation of it on account of race, color, or condition. It is by compelling a choice between the admission of the negro and the exclusion of the white man, that the former may be incidentally invested with the right to vote; but still the State is free to elect between the alternative propositions, and so may defeat negro suffrage, as it may defeat white suffrage. In either case it is the will of the State that determines the event. It results, therefore, that the Fifteenth Amendment is obnoxious to neither of the two objections leveled against it from opposite quarters — from one quarter, that it imperatively bestows suffrage on the negro; from the other, that it affords no adequate guaranty against the exclusion of the negro from the elective franchise. Precisely the same guaranty secures suffrage to the negro and to the white man; namely, an identical qualification for both and a loss of political power consequent on the proscription of either.

Enough is written, I trust, to vindicate the new Amendments from the disparagements of a critic to whom, one would suppose, they would appear of

inestimable moment and value, as imparting and securing all the rights and privileges of American citizenship to the race of which he has approved himself the able and enthusiastic champion.

Along with Magna Charta and the Declaration of Independence, these ordinances will descend to the remotest posterity as monuments of human freedom and progress.

III

THE SOLDIER THE FRIEND OF PEACE AND UNION

III

THE SOLDIER THE FRIEND OF PEACE AND UNION

[The proceedings on the evening of Decoration Day, May 30, 1877, in the Academy of Music, Brooklyn, were characterized by this circumstance of special interest: that it was the first reunion in the country of Federal and Confederate soldiers after the close of the Civil War. General Catlin, a distinguished hero of the War, spoke as the representative of the Federal army; General Pryor gave expression to the sentiments of Confederate veterans on the interesting occasion. The following correspondence sufficiently explains the publication of the speech here presented:

BROOKLYN, N. Y., June 6, 1877.

TO THE HON. ROGER A. PRYOR:

Sir—Your address at the Academy of Music, in this city, on the evening of Decoration Day, has struck us as so valuable a contribution to the history of the time, and as so likely to conduce to the growth and strength of amicable relations throughout the country, that we consider its extensive circulation very desirable. To that end we respectfully ask that it may be published in pamphlet form.

WILLIAM C. DE WITT,
JOHN P. ROLFE,
WINCHESTER BRITTON,
B. F. TRACY,
A. W. TENNEY,
GEO. H. FISHER,
JOHN A. LOTT,
JOSHUA M. VAN COTT,
JACOB I. BERGEN,
EDGAR N. CULLEN,
JOHN WINSLOW,
ALEX. MCCUE,
HENRY C. MURPHY,
FREDERICK A. SCHROEDER,
JOHN GREENWOOD,
SAMUEL D. MORRIS,
ABRAHAM H. DAILEY,
GEO. G. REYNOLDS,
ALBERT DAGGETT,
J. S. T. STRANAHAN,
DEMAS STRONG,
JOHN W. HUNTER,
STEWART L. WOODFORD,
J. W. GILBERT,
JOHN R. KENNADAY,
LUCIEN BIRDSEYE.

BROOKLYN, 147 Willow St.,
June 9, 1877.

GENTLEMEN:

My aim in preparing the address was to promote the "growth and strength of amicable relations throughout the country," and since you assure me its publication may conduce to that result, I have pleasure in placing it at your disposal.

With a grateful sense of the kindness implied by your request, I am, gentlemen,

Most respectfully,
Your obedient servant,
ROGER A. PRYOR.

Messrs. William C. De Witt, and others.]

WHILE thanking you, gentlemen of the committee, for the invitation which privileges me to be present on this interesting occasion, I owe it to candor to disclaim the affectation of regarding your civility as implying in any sense a personal compliment. It bears, I know, a weightier and a worthier significance. In soliciting the participation of Confederate soldiers in the solemnities of this day, you mean to tender them an overture of reconciliation, to avow your good-will toward your recent adversaries, and to proclaim your desire for the prevalence of peace and fraternal feeling between the lately belligerent sections. By no token more touching and impressive could you make manifest these liberal and patriotic sentiments. To proffer your former foes a share in the simple but pathetic ceremonial by which, on this hallowed anniversary, you symbolize the perennial bloom and fragrance associated with the memory of your departed comrades, to admit us into the sanctuary

of your sorrows, and allow us to unite in the homage you render to the fallen heroes of the Union, is indeed so affecting a testimonial of your kindness and magnanimity, that we unreservedly yield ourselves to its benign influences and reciprocate, with all the warmth or our ardent Southern nature, the inarticulate but heartfelt aspiration for the reign of peace and good-will over our agitated and afflicted land.

That from our bosoms every vindictive and uncharitable recollection of the unhappy conflict is banished, never to return, we this day attest by the last act of concession and conciliation — even by bearing the tribute of praise and benediction to the tomb by whose hand our Confederate Republic was stricken down.

By a solemnity so impressive, by a sacrifice so transcendent, the soldiers of the lately contending armies trust to propitiate the fell spirit of discord, and to gladden the nation once more with the blessings of a restored and reconciled country.

And this, the highest office and most precious service of patriotism, is fitly appropriated and discharged by the soldier; for, was not the soldier ever the friend of peace and the Union?

If we carry back our memories to the controversy which eventually issued in the war, we shall recall the name of no soldier, on either side, who aided to inflame the animosities of section and precipitate the collision. The bloody business of secession, with all its disastrous consequences, was

wholly the act of the professed men of peace — the politicians. They nullified the Constitution in its plainest and most peremptory obligation; they broke that compact of pacification — the Missouri Compromise — under which the Union had reposed for nigh forty years; they rekindled and blew into conflagration the almost extinct embers of the abolition agitation; they obtruded into the presence of the Supreme Court with their factious clamor, and compelled even that august tribunal to become accomplice in the work of commotion; they lashed the popular mind into fury over imaginary wrongs, and to intercept the occurrence of fictitious evils occasioned a catastrophe which actually afflicted the country with every conceivable calamity. To vindicate the abstract right of potential secession they challenged an encounter which issued in the irresistible aggrandizement of the Federal power; to preserve the ideal existence of slavery in the Territories they provoked a war which ended in the annihilation of slavery in the States.

Meanwhile the soldiers of the nation, no matter where their birth or what their political opinions, uniformly opposed themselves to every act and every word of which the aim or tendency was to engender ill-feeling between the States or impair the stability of the Union. The illustrious Scott, hero of two wars, victor on the far distant battlefields of Chippewa and Cerro Gordo, achieved, in his endeavor to arrest the progress of disunion, a

civic crown no less resplendent than his martial fame.[1]

And that other Federal soldier, right arm of Scott in his career of conquest, whom to name now might perchance jar upon the harmonies of the occasion, but of whose exploits history nevertheless will make due celebration in her immortal epic — he, like his great chief, was pierced with the anguish of despair by the menace of civil war. Not the ill-fated Falkland himself was more tenderly enamored of peace, or more passionately prayed Heaven to avert from his country the agony and the ignominy of fratricidal strife, than he who by the cruel irony of fate was destined to lead the Confederate armies through so much carnage in a hopeless struggle with the Union.

And so with all. Call the roll of fighting men, whether in the army or the navy, and mark one known to fame who was not the friend of peace, the advocate of conciliation. The soldier is a patriot from necessity — by the habits of education, and by the instincts of honor, which to him are the principles of nature. Identified with the fortunes of no party, implicated in the intrigues of no faction, he looks to the country, the whole country, for the recognition and reward of his valor. Meaning himself to fight if peace be impossible, and well aware that war is the consummation of human

[1] Allusion to General Scott's suppression of the South Carolina Nullification movement in 1833.

woe, he shrinks back from the dread arbitrament till duty bids him draw the sword.

And so, while free from the awful responsibility attaching to any the least agency in causing the conflict of 1861, yet when by the follies and the crimes of the politicians the crisis came, the soldier was prompt to respond to the call of his country.

His country — but where was *his* country? Upon this momentous question the simplicity of the military man was perplexed by the sophistications of the politicians. To the Southern soldier the State — the sovereign State — whose guardian care he felt in every interest and relation of life, whose bosom was for him the "mother earth", whence he sprang and to which he would return in the sepulchres of his fathers — to the reason and affection of the Southern soldier the State appealed with a supreme and irresistible title to allegiance. But Federal soldiers! Your country was commensurate with the limits of the *united* States; the symbol of your fealty was the flag floating over the undivided and indivisible expanse of the Republic; the cause for which you fought was the Union inviolate and inviolable.

At this point of political divergence parted the soldier of the North and of the South — each impelled by a motive of genuine patriotism, each contending for a cause which shone clear to his conscience, each striving after an object deemed worthy of heroic effort and heroic sacrifice. Hap-

pily for the infirmities of human nature, the Supreme Ruler, in dispensing his retributions by means of the moral judgments of the world, compassionates the errors of man and to his motives only imputes culpability. From the reproach of conscious wrong the soldier of the South is free; and if, in lifting his hand against the majesty of the Republic, he were in fault, grievously has he answered it! Obdurate indeed must be the heart — harder than the rock hewn from the Caucasus — that can look abroad over the wasted fields and the desolate homes and the stricken families of the South, and not melt into pity at the spectacle of so much suffering and so much sorrow. In the bloody conflict friends were lost to you,— over their graves we have strewn to-day garlands of amaranthine bloom,—but far from your homes and your harvests rolled the lava tide of war; and in the triumph of your cause you found a consoling recompense for your bereavements. Men died, but the Union lived; and the earth was filled with the echoes of your acclamation. But for the Confederate soldier all was lost; and as he came back from his captivity silence greeted him with the welcome of despair! Feel you not that to exult over his misfortunes ill-beseems the pride of a magnanimous foe!

So much in any event is certain, that by fearlessly fronting death, and by the heroic endurance of pains and privations worse than the agony of death, the Confederate soldier vindicated tri-

umphantly the sincerity of his conviction and made good whatever claim to your consideration is implied in an unselfish devotion to a cherished though vanquished cause. *Victrix causa diis placuit sed victa Catoni.*

No blame, then, for that stupendous folly, the war of secession, attaches to the men who bore its brunt. The politician began it; the soldier ended it. And, during its progress, whatever of barbarity aggravated its essential ills is imputable, not to the fighting man, but to the civilian. Clemency no less than courage is the ornament of true knighthood; but while the soldier's spirit is exalted by the ambition of glorious deeds, the politician stoops to mean resentments and ignoble reprisals. For those acts of vengeance of which each side hastens now to exculpate itself to history, but over which it behooves both to drop the veil of oblivion — for those dastardly and despicable inhumanities the men of the cabinet are accountable; and the luster of Grant's and Lee's renown is untarnished by the atrocities of the prison-camp. The columns of neither army, in their intrepid onset, were inflamed by the incitements of passion; but in the fury of the combat feeling still for his foe the affection of a former and a future brother, the soldier gladly sheathed his sword from his bloody execution. In every pause of battle the contending hosts intermingled, and for their involuntary cruelties made atonement by an eager interchange of the charities of humanity. On the field of

Antietam, while the carnage stayed that the wounded and the dying might be taken away from the dreadful scene, a Confederate general [the speaker] and your own gallant Meagher grasped hands, in pledge of a friendship the shock of war could not break asunder, and in instinctive but unspoken presage of a community of country that returning peace should restore and perpetuate.

But it was in the final catastrophe of the contest that the spirit of chivalry attained its appropriate culmination — when the great captain of the armies of the Union, in accepting the surrender of his equally great antagonist, spared him the humiliations of defeat, and to him and his vanquished veterans accorded the tribute of glory due to a frustrate but heroic struggle. Then was exhibited in no unequal measure the greatness of soul with which the Roman conqueror saluted the misfortunes of the Macedonian monarch; and then too did the leader of the "Lost Cause" by his unshaken equanimity put to shame the supplications of Alexander's degenerate successor.

Such being the spirit of the soldiers in the war, no wonder they hailed with enthusiasm the advent of peace; no wonder that from the slaughter of compatriots their impatient hand turned with alacrity to the blessed work of pacification.

With what eager overtures of reconciliation did Sherman signal to Johnston to desist from the unnatural contest; and with what a wise magnanimity did he lure the heart of his adversary back to its

early love for the Union. Brilliant though be the campaign by which he cut the Confederacy asunder, his most worthy achievement was the capitulation of Raleigh, for by that act of intrepid generosity he made conquest of the affections of his foe, and transformed an embattled host into a community of grateful citizens. Had not that auspicious compact been annulled by the intrigues of the politicians, had its benign spirit informed and actuated all subsequent policies of reconstruction, the darkest page in the history of the Republic would not remain yet to be written, and this glad day of reconciliation would have been anticipated by many long and agonizing years. No, fellow-citizens, for the interval of gloom and shame lying between the baleful splendor of the war and the present golden dawn of peace; for the nameless outrages and ignominies of that dismal period,— massacres of the helpless, violations of the ballot, usurpations of force on the popular will and the independence of the States,— with these affronts to freedom and civilization the soldier may not be reproached. His intervention, when at times it has happened to arrest the operation of constitutional government, was not the effect of his own volition; for standing guard over imprisoned liberty is not the willing service of the American soldier; and if he appeared on the scene of confusion, his presence was ever the guaranty of order and tranquillity. When a detachment of troops occupied the capitol of South Carolina, the hitherto unsullied sanctuary

of its sovereignty, they moved in submission to an order from Washington; but when afterward the Federal soldiers in New Orleans fraternized with Confederates in celebrating the deliverance of Louisiana, they responded to the spontaneous and exultant impulse of their own gallant spirits.

In the system of American government the autonomy of the State is a no less essential principle than the liberty of the individual; exists, indeed, only as the support and safeguard of the personal rights; and when in the march of encroachment the independence of the State is subdued, the freedom of the citizen is exposed to an easy and irresistible subjection.

But a scheme of administration by which the civil was subordinated to the military power, and the prodigy of republican institutions under the patronage of bayonets exhibited to the wondering gaze of the world, by which that most precious principle of American liberty, the right of local self-government, was subverted and on its ruin erected a repulsive compound of alien rule and Federal domination; by which sovereign States were reduced to the impotence of satrapies and a commandant of the barracks invested with the majesty of the people: such a scheme of administration, however specious the pretext of its existence, and however formidable the forces enlisted in its support, was doomed from the beginning, and by the organic vice of its being, to an inevitable and ignominious overthrow. Fallen it is at last; fallen like Lucifer, never to hope

again; fallen by the thunderbolt of the people's wrath; and as it topples down "in hideous ruin and combustion," the nation hails with acclamation the returning reign of freedom and peace.

And by none is the auspicious day of liberation and reconciliation saluted with more enthusiasm than by the veterans of the Union army. In the phantom of "the bloody shirt" and the specter of the "prostrate State" factions found available topics of incendiary appeal, and politicians combine now to accuse and obstruct a pacification which threatens to leave neither party a cherished wrong to expose nor a fondly nursed grievance to denounce; but the soldier, instinct with a better patriotism, seeks no object besides the welfare of the country and, informed by a truer wisdom, knows no other policy than the counsels of conciliation.

Yes, fellow-citizens, the Union is re-established; re-established not only in the supremacy, but in the beneficence of its power; re-established not merely over the wills, but over the hearts of the people, and of *all* the people. While its privileges and protection were unequally dispensed, while toward the South the Constitution shone with a darkened and sinister aspect, the affections of the people were chilled and their confidence repelled; but now that every State is respected in her sovereignty and every man in his rights, the Union is restored in all its ancient strength and glory: and be persuaded, you may repose as serene a trust on the loyalty of Louisiana as upon the well-tried fidel-

ity of your own great commonwealth. In obliterating all discriminations between States and between citizens, you have effaced the ill-omened distinction of sections, and henceforth in the vocabulary of American politics the South is only a geographical expression.

And this is the tribute a Confederate soldier brings to-day to the graves of the fallen heroes of the Union — the solemn assurance that they fell not in vain,— that the work they died to achieve saved the Union from overthrow, you by the policy of justice and magnanimity have enshrined it in the hearts of its once furious but now reclaimed and reconciled foes.

If we may suppose the men whose deeds you now commemorate to be attentive still in their blest abodes to the transactions of their surviving comrades, with what joy and exultation do they contemplate the incidents of this day! Insensible though they be to the echoes of earthly applause, even their chastened and exalted spirits must be soothed by the solemn acclaim of a nation rendering homage to the virtues of its heroic dead. But, not in the hush of a gracious holiday, nor in floral offering, nor martial requiem, nor the pomp and pageantry of a funeral procession; nor yet in the voice of renown reverberating their exploits through the ages,— not in any nor in all of these celebrations so dear to the heart of mortal hero does the supreme reward, the true triumph, of the departed soldiers of the Union consist. In this alone is their glory consummated

— that the cause for which they gave their lives has prevailed; in this alone is their victory complete — that the republic has emerged from the cloud and carnage of war unbroken in unity and undimmed in luster; in this is the ecstasy of their exultation — that hands once red with fraternal blood are this day clasped in pledge and proclamation of a restored and perpetual brotherhood. While man applauds, heaven ratifies the reunion, and beams approvingly on the prevalence of charity in the councils of nations.

That the memories of intestine war oppose no obstable to the reunion and harmonious co-operation of the once hostile parties and dependencies, experience attests by abundant and most instructive instances. Indeed, from the largest induction we may infer it as a principle of political philosophy, that the development of national unity is accomplished by the method of internal agitation, and that the coherence of the aggregated parts of a state is proportioned to the violence with which they are brought together. For illustration we have no need to recur to the remote if not imaginary examples of classic history; for of the annals of modern times the monotonous lesson is that empire is composed of a succession of conquests, and is consolidated by the fierce but ineffectual efforts of its constituent members to resist the process of assimilation.

In France the war of the Fronde issued in the establishment of that compactest of nationalities; and of the followers of Napoleon in his conquest of

Europe the most faithful were those Vendeean Bourbons who so desperately resisted the régime of the revolution. In the united Germany of to-day we see the result of centuries of civil and religious struggle; nor of the provinces ruled by the Kaiser are they the least docile and devoted that the victory of Sadowa gave him. Sweden and Norway have accommodated their traditional feuds by union under a single crown; while Austria and Hungary, having replaced the subjugation of 1849 by an alliance of choice and equality, move onward in the path of prosperity under the impulse of the same will and an identical interest. In Italy the hates and revenges of a thousand years' domestic conflict have yielded at last to the undying instinct of nationality; and Florence and Genoa, Venice and Rome, are once more embodied in the unity of a free and mighty empire. Most significant of all is the instance of Great Britain; for it conveys at once a promise and an admonition; and by the examples of Scotland and Ireland teaches statesmen as well the folly of a proscriptive as the wisdom of a magnanimous policy. The boast of Chatham was not an idle vaunt. The hereditary foe of the Lowlander he enticed from his mountain fastness, tamed his wild spirit to the arts of peace, and, by according him the rights of a freeman, inspired the devotion that stayed the onset at Waterloo and brought relief to the despair of Lucknow. But Ireland — after ages of conquest her heart still spurns the Saxon's caress; and her gallant sons, finding in

their native land neither civil nor religious liberty, to the aggrandizement of England's rival contribute the strength of their arm and the wealth of their genius. Ireland to-day repeats the mournful refrain of history, that injustice and intolerance are the blight of empire; while in the opulence and repose of Scotland we behold the never-failing effect of a policy of *conciliation*.

No cause have you, people of the North! to mistrust the professions of fealty to the Union by which the Confederate soldier requites your fidelity to the Constitution. To his forefathers history ascribes, and you will not refuse, an equal hand in forming the Union, an equal contribution to its resources, and an equal courage and devotion in its defense. From the day a Southern soldier took command of the army of the Revolution in the capital of Massachusetts down to that recent time when another Southern soldier led the armies of the Union to the capital of Mexico, the men of the South have borne a not inferior part in every effort and every sacrifice for the glory of the Union.

Pardon me if I recall that it was a Southern man — even Washington — with whom, by the suggestion of the Conference at Annapolis in 1786, originated the idea of the Union; that by another Southern man — Randolph, of Virginia — the fundamental plan of the Union was propounded to the Convention at Philadelphia; that Virginia, in conjunction with New York, determined the final adoption of the compact of union; that it was

Marshall, the Virginian, who by authentic and authoritative construction of the Federal Constitution endowed the Union with the energies of a nation and enabled it to survive the strain of civil war; that it was Monroe, the Virginian, who, by asserting the freedom of the New World from the intrigues of European ambition, opened for the Union an unimpeded and unbounded arena of development; that Virginia of her bounty brought to the bridal of the young Republic the gift of an imperial domain — and, let me add, all shrunken and beggared as she is, she does not repent that she impoverished herself for the aggrandizement of the Union; that by the skill of a Southern statesman the navigation of the Mississippi was liberated from foreign control and made the priceless monopoly of American commerce; that by a Southern President the second war of independence was conducted to a successful termination; that by the diplomacy of another Southern President Texas was wooed and won to the embrace of the Union; that under the administration of still another Southern President the Union was enriched and embellished by our golden conquests on the Pacific. Bear with me while, not in the ostentation of sectional vainglory, but merely to verify the fidelity of the Confederate soldier to the Union, I recount these among the many services and trophies which his forefathers have contributed to the strength and grandeur of the nation.

With the people of the South affection for the

Union was a sentiment of ancestral pride as well as a principle of traditional policy; and only by the urgency of some casual and extraordinary crisis could they ever have been precipitated into secession. They went about to erect a separate government for themselves, not from an impulse of hostility to the Union, but from attachment to principles they had been taught to think paramount to the Union itself; and in parting from the Union they felt all the pangs of violated nature as well as the griefs of baffled hope. But now that slavery no longer impinges on their understanding with a sinister bias, and the idol of State sovereignty no longer challenges of them a divided duty, love of the Union resumes its original ascendency in their hearts; the beneficence of the Union claims a supreme consideration in their counsels.

Be assured, Southern statesmanship is not so blinded in its proverbial sagacity as not to see that henceforth the strength and security of the South are to be found only under the shield of the Union. Against the perils of foreign invasion it gains in the Union the bulwark of a mighty prestige and an invincible army. As a guaranty of peace between its discordant peoples the ever-imminent intervention of the Federal arm will operate to deter the unruly and to tranquillize the timid. Freedom and facility of access to every part of this vast and opulent land open to the enterprise of the South a boundless field of adventure, and impart to its industrial and commercial energies a quickening impulse of de-

velopment and fruition. Meanwhile, an expedient devised to balk the ambition of the white race recoils upon its course, and, by augmenting the political power of the South, enables its aspiring spirits to play a splendid and superior part on the theater of Federal affairs.

If, in contrast with the brilliant future offered to the South in the Union, you contemplate for a moment the destiny to which it would be condemned by another civil convulsion, caused by another revolt against the Federal power; the havoc and carnage of a war aggravated by a conflict between races and issuing inevitably in the catastrophe of a remorseless subjugation, you cannot, on the supposition that the Southern people are rational beings, impute to them any other policy or purpose than to cleave to the Union as their only and their all-sufficient shelter and support.

But you say, perhaps, that these dictates of reason, obvious and imperative though they be, are counteracted by the blind impulses of passion; that rage at the miscarriage of his cause, revenge for the many calamities and contumelies he suffered from the victorious North; that all the unappeased and inappeasable resentments of the war, still operate to cherish in the Confederate soldier undying hate of the Union. Now, I do not pretend — it is not essential to my argument to pretend — that the Southern soldier contemplated the fall of the Confederacy with indifference. Born of an enthusiasm for liberty, erratic, if you please, but not the less

genuine and exalted; endeared by the memory of so many sacrifices and so many sorrows heroically borne in its behalf; gilded by so much glory and hallowed by the blood of the brave and the tears of the fair, its disastrous overthrow smote upon the heart of the Southern soldier with an anguish he may not utter, but which he disdains to dissemble. Nor will you, its exultant but not ungenerous foe, grudge him who followed its flag through the few years of its battle-crowded career this mournful recollection of its tragic story.

But this is the effusion of feeling; an homage of the heart for which it does not solicit the sanction of reason. From the vantage ground of a larger observation, with a more calm and considerate meditation on the causes and conditions of national prosperity; I, for one, cannot resist the conclusion that, after all, Providence wisely ordered the event, and that it is well for the South itself that it was disappointed in its endeavor to establish a separate government. Plain is it to be seen now that such government, if once established, could not in the nature of things have long endured, since in conceding the right of any State to secede at will the Constitution of the Confederacy made express provision for its own dissolution. A little while, and its members, urged by some special interest or sinister ambition, would have receded from the alliance; and then one after another have fallen a prey to foreign aggression or domestic anarchy. Moreover, the process of disintegration would not have

ceased with the exit of the South nor have been limited to the confines of the Confederacy; but the example of successful dismemberment, communicating its contagion to the remaining States, and the principle of cohesion lost from the Union, North America would have exhibited that dissolving view of crumbling governments and chaotic societies which in other quarters of the New World so disheartens the friends of freedom and civilization.

Nor to the restoration of the Union is the Confederate soldier any the less reconciled by the destruction of slavery. True, the material interests of the South were essentially implicated in the maintenance of the system; but, philosophically, it was the occasion, not the cause of secession. For the cause of secession you must look beyond the incident of the anti-slavery agitation to that irrepressible conflict between the principles of State sovereignty and Federal supremacy which, menacing the Union in its conception as the twin children of the patriarch wrestled for the mastery in their mother's womb, again endangered its existence in 1798 on occasion of the Alien and Sedition laws; and again in 1819, on occasion of the admission of Missouri; and still again in 1833, on occasion of the protective tariff; and which, arrested by no concession and accommodated by no compromise, continued to rage with increasing fury until, provoking the revolt of the South, it terminated finally in the absolute and resistless ascendency of the national power.

In 1861 the people of the South resented the

intervention of the Federal Government to restrict the extension of slavery; but it was the principle not the object, of the interference that encountered their opposition; and any other usurpation of Federal power on the sovereign rights of the States would equally have challenged their resistance. Nor, suffer me to say, was slavery any more the point of your attack than of our defense; for otherwise, in beginning the war the Federal Government would not have been so scrupulous to proclaim through all its organs its purpose not to touch any the least of the securities of slave property.

No, people of the North, impartial history will record that slavery fell not by any effort of man's will, but by the immediate intervention and act of the Almighty himself; and in the anthem of praise ascending to Heaven for the emancipation of four million human beings, the voice of the Confederate soldier mingles its note of devout gratulation. The Divinity that presided over the destinies of the Republic at its nativity graciously endowed it with every element of stability save *one;* and now that in the exuberance of its bounty the same propitious Providence is pleased to replace the weakness of slavery by the unconquerable strength of freedom, we may fondly hope that the existence of our blessed Union is limited only by the mortality that measures the duration of all human institutions.

But why argue on speculative grounds, to prove the patriotism of the Confederate soldier,— since within these few months he has, by so memorable

an illustration, vindicated his fidelity to the Union? You cannot have forgotten — for the land still trembles with the agitations of the crisis — that when of late a disputed succession to the Presidency appalled the country with the imminence of civil war; when business stood still and men held their breath in apprehension of a calamity of which the very shadow sufficed to eclipse all the joy of the nation!— you cannot but remember how, obdurate to the entreaties of party and impenetrable to the promptings of resentment, and responsive only to the inspirations of patriotism, the Confederate soldier in Congress spoke peace to the affrighted land. Your difficulty was his opportunity; he had only to say the word and the fatal fourth of March would have passed without the choice of a Federal executive, and the Union have been involved in the agonies of a dynastic struggle. But with a sublime magnanimity he spurned the proffered revenge — and yet do you say the Confederate soldier is false to his allegiance?

Pardon me if even in this presence I make bold to protest that he was never faithless to his trust; to declare that when you thought him treacherous to the Union he was only true to his State; and to tell you that when he braved all the wrath of your majestic power, it was only in heroic fidelity to a weak, but with him an all-commanding cause. If your reproach be just, and the Confederate soldier were a conscious culprit, then indeed is reconciliation a folly and a crime; for, if false to you once, he may

betray you again; and instead of alluring him to your embrace by these overtures of fraternity, you should repel him from your presence as a perfidious outcast. No, patriots of the Union! the Confederate soldier offers not to your confidence a conscience stained with the guilt of recreancy. Veterans of the Union! he comes not into your companionship with confession of criminality; but for the credentials of his loyalty to the Union he proudly adduces the constancy with which he clung to the fortunes of his ill-starred Confederacy.

And so, fellow-citizens, by the reciprocation of esteem and the kindly offices of mutual confidence, the soldiers of the late war are brought to-day to fraternize over the graves of their departed comrades, and to renew with ceremonies of impressive solemnity their vows of fealty to the Constitution and the Union. While on the one side the soldier of the North engages to keep watch over the rights of the State, and to see that its liberties be not profaned by military usurpation, nor its sovereignty disparaged by Federal intervention, the Confederate soldier on his part pledges himself to repel every approach of danger to the Union. Of this alliance so propitious to the peace and stability of the nation, no ill-omened reminiscence shall interpose to imperil the integrity; but whatsoever of common glory may be gathered from the annals of the Republic shall be culled out and collected into an indissoluble bond of brotherhood. The memory of Washington and Montgomery, Greene and Putnam,

of Jefferson and Hamilton, of Jackson and McDonough; the shades of the nameless heroes of the Revolution, whose unforgotten graves were not passed without honor in the processions of this day,[2]— all, all shall be invoked to still the clamor of sectional jealousies. Nay, even the incidents of our unhappy conflict, gaining as they recede from view the halo of historic illustration, shall lose their irritating and repulsive aspect; and the victories of the war shall be recounted with equal and impartial exultation whether they signalize Federal or Confederate valor. And hereafter, should the menace of foreign aggression summon us to marshal the heroes of the past for present encouragement and emulation, the images of Grant and Lee, of "Stonewall" and Sherman, shall speak a sufficient assurance at home and admonition abroad, that for the most puissant power on earth the conquest of America is an impossible achievement. Thus, even in the tomb the Federal and the Confederate soldier shall prove the friends of peace; and their blended memories serve as a safeguard of the Union.

[2] The American soldiers who fell in the battle of Long Island were buried at Fort Greene; and part of the performances of the day was the decoration of their graves.

IV

THE GENERAL GRANT ANNIVERSARY

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[Speech on the occasion of the banquet to celebrate the seventy-first anniversary of the birth of General U. S. Grant, at The Waldorf, Thursday, April 27, 1893.]

General Horace Porter presented Judge Roger A. Pryor, with the following introduction.

Gentlemen — We have another distinguished general here to-night, who fought with us in the war, but not on the same side. It has been said that it is astounding how you like a man after you fight him. That is the reason we have him here to-night — to give him a warm reception.

He always gave us a warm reception. He used to take us and provide for us, and was willing to keep us out of harm's way while hostilities lasted — unless sooner exchanged. He was always in the front, and his further appearance in the front to-night is a reflection upon the accuracy of our marksmanship. Not knowing how to punish him there, we brought him up to New York and sentenced him to fourteen years of hard labor on the bench. Gentlemen, I introduce to you General Roger A. Pryor.

In reply Judge Pryor said: Mr. Chairman

AND GENTLEMEN — It was the sword of Grant that smote the Confederacy to its fall; and yet I, a Confederate soldier, am pleased in the privilege afforded me by your invitation of testifying my appreciation of his greatness.

By the accordant voices of all men in all ages martial achievement constitutes a pre-eminent title to renown; and it is not for me to gainsay the glory of him whose skill baffled the strategy of Johnston and prevailed over the genius of my own illustrious commander.

From Donelson to Vicksburg the campaign of General Grant in the West was an unchequered career of conquest. In the East he effaced from your flag the blemish of a three years' ineffectual effort, and carried it in triumph to the catastrophe at Appomattox. Commencing his career at the beginning of the war on a level with the million men you sent to the field, with no power to push his fortunes, with no augury of success attaching to his name, with a modesty that veiled his worth and hindered his advancement, nevertheless, at the end of the arduous struggle he emerged, by merit alone, pre-eminent over all rivalry and the unchallenged chieftain of the armies of the North. That he achieved what all others had failed to accomplish, that, confronted by a foe of unsurpassed courage and constancy, and opposed by leaders with an ability for war unequal only to the attainment of the impossible, he yet overcame all obstacles and vanquished every antagonist, is enough to associate

him with the Caesars and Napoleons in the Pantheon of Immortals.

But even more worthy of homage than his military exploits is the magnanimity with which, in the hour of triumph, he disdained the trophies of victory, and the clemency with which, in the fury of battle, he proffered a helping hand to his fallen foe.

There are those who, conceding the distinction of Grant as a soldier, affect to deplore his miscarriage as a statesman. But when I recall the problems that confronted him as President — the repairing of ravages of war — *bellum plus — quam civile;* the repressing the spirit of revolt smothered, but not subdued; the ameliorating the evils of the social and civil convulsion in the South consequent on the emancipation of five million negro slaves and their incorporation into the system of American citizenship; recollecting, too, the critical altercations with foreign powers inherited by his administration remembering these tremendous troubles, and considering that nevertheless he safely piloted the Republic through all its perils, and delivered it to his successor unfettered in freedom, undiminished in strength, and undimmed in luster, I do not hesitate to avow the conviction that Grant was as great in peace as in war.

Laying aside, however, all his other titles to renown, this remains unquestioned and unquestionable — that this strong arm upheld the Union in the instant of imminent overthrow, and assured it an endless duration of grandeur and glory; and I, a

Confederate soldier, proclaim that by the preservation of the Union Grant rendered to the cause of liberty and civilization as transcendent a service as any recorded in the annals of human achievement.

And so, by the majestic simplicity of his character; by his constancy in adversity and his moderation in prosperity; by his genius alike in peace and in war; by the splendor of his deeds in the meridian of life, and by his sublime fortitude in the agonies of death, Ulysses Grant presents a figure in history before which the coming ages will bow in reverential admiration.

V

THE RECIPROCAL OBLIGATIONS OF THE BENCH AND THE BAR

V

THE RECIPROCAL OBLIGATIONS OF THE BENCH AND THE BAR

[The following address was delivered at the annual dinner of the alumni of the University Law School on April 18, 1895, in response to the toast, "The Bench."]

Mr. Chairman and Gentlemen:

The topic naturally suggested by the toast you offer is the reciprocal obligations of the Bench and the Bar. The duty of counsel is by careful research and discussion so to present the case, on each side, as to enable the Court to render a right decision. In the performance of this function great scope is afforded for the display of learning and ability. The learning, however, should not be abused by an ostentatious prodigality of citation, but be seen only in the production of authorities pertinent and conclusive of the point. Bulk is not always weight; and the attraction of a brief may be in an inverse ratio to its length. And the ability exhibited should be manifest in an orderly marshalling of essential facts, in a firm grasp of the principles involved, in an accurate apprehension of the conflicting analogies, and in an argument clear, compact, and cogent. Forensic eloquence, though not of the kind formerly in vogue — florid, copious, and

declamatory — is still a power, but simple, subdued and severely logical — pure reason aglow with animation.

The first and indispensable requisite is to engage the attention of the Court; and by no means is this condition so effectually fulfilled as by luminous statement, elegance of diction, methodical arrangement of topics, and earnestness of address. I say elegance of diction, because, after all, there is a fascination and an effect in mere felicity of phrase; and I inculcate earnestness of manner, because the Horatian precept, "*Si vis me flere,*" is as imperative as ever.

Having so presented his client's case, the advocate's office is at an end, and the judge occupies the scene with his imposing presence. The duty of the Bench to the Bar is primarily a patient attention to the arguments. "Patience and gravity of hearing," says Bacon, "is an essential part of justice, and an overspeaking judge is no well-tuned cymbal." However able the judge, and however inexperienced the lawyer, it stands to reason that he who has made a special study of the case must know it better than he to whom it is just presented, and that so something may be learned even from the speech of the least expert advocate. Hence another maxim of the same great authority, namely: "Let not the judge meet the cause halfway, nor give occasion to the party to say his counsel or proofs were not heard." Again, the advocate is entitled to the most respectful treatment by the

Court. The amenities of the gentleman are not incompatible with the dignity of the judge. And this courtesy of the Bench to the Bar should not be proportioned to the eminence of the advocate; on the contrary, the younger, the weaker, and the obscurer the counsel the clearer his title to deferential encouragement from the Court. It may be more perilous to provoke a duel of wit and disputation with a Choate than with a tyro, but for that very reason the judge should be prompter to challenge Mr. Choate than the tyro. How crushing to modest merit a sneer or a frown from the Court, and how cruel, too! How helpful a word of praise or a look of approval!

The briefs handed in, the judge should study them thoroughly and impartially, so that when he delivers his decision the defeated counsel will say that at all events the Court has tried to do justice. It is not for mortals never to err, and everything will be forgiven to the judge who has sought diligently and conscientiously to discover the right. Whether he go wrong from corruption or indolence, the miscarriage of justice is the same, and equally oppressive to the suitor.

But while gravely meditating the case, the judge need not prolong his deliberation to an Eldonian period of gestation. *Curia advisari vult* should not be the synonym of interminable procrastination. In Magna Charta the sale of justice, the denial of justice, and the *delay* of justice appear in the same category of unpardonable offenses. Indeed, gentle-

men, the judicial office is not of dignity only, but of awful responsibility. The dispensing of justice, the righting of wrong, the protection of innocence, the punishment of guilt — these are its functions; and what prudence, what labor, what vigilance, what learning, what courage, what probity, are indispensable to their faithful fulfillment! Be assured that the Bench has its trials and perplexities, and is not exempt even from the remorse of an unjust decision, though the effect merely of human fallibility. Bear with us, then, I pray you, if, under the strain of our arduous, anxious, and distracting duties, we sometimes lapse into error and occasionally give vent to ebullitions of ill-humor. Over the infirmities of the upright judge charity will cast its veil; and the worth of the magistrate may atone for the weakness of the man.

Gentlemen of the Bar, the Bench greets you as brothers. It is only while the ermine is on that we assert the superiority of position. Descending from our official station, we stand on a level with the most recent of Dr. Abbott's graduates, and we solicit from them the familiarities of an equal friendship. Meanwhile, we invoke for you, one and all, the utmost fortune of the profession. *Dat Galenus opes, dat Justitianus honores;* wealth is not the reward of the lawyer, but by noble endeavor he may attain a better prize — a name of renown and an influence for good.

VI

THE BAR AND FORENSIC ORATORY

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[Address to the graduating class of the Albany Law School.]

Mr. President, and Gentlemen of the Graduating Class:

The invitation with which you have honored me imposes an obligation which I know not how otherwise so effectually to discharge as by communicating to you the results of my observation of the means by which success at the bar is most surely achieved.

You pause to-day at a critical stage of your professional career, when abandoned by the guidance of the wise and faithful preceptors who have conducted you hitherto, you are left to your own resources and to the direction of your own judgment, in the pursuit of the prize so eagerly coveted and yet so difficult of attainment.

What if one who himself has run the race and has missed the goal; who, mindful of the infirmities and limitations that hindered his efforts, and yet observant of the arts by which more skillful competitors have grasped the reward; what if he should generalize his experience in lessons of practical utility to the adventurous but untried advocate — would you not accept the hand so extended to you, as of more help than any declamation, how-

ever eloquent, upon any theme however fraught with interest and excitement?

I will not affect to disguise from you the labors and difficulties that beset the path upon which you are about to enter.

"The immortal garland is not to be run for without dust and heat," and the victory you are to achieve will be the crown and recompense of infinite toil; of obstacles overcome; of high faculties exerted to the utmost effect; of many a miscarriage and much humiliation; of the solicitations of pleasure spurned for nobler but less attractive objects of desire; of a life consecrated in all its energies to the single aim of eminence and distinction in your chosen profession. But to the aspiring and resolute spirit the frown of difficulty and danger is but a challenge to increase of exertion, and the trumpet call of ambition of more potency than all the beckoning blandishments of indolence and ease.

To sustain, then, the efforts and privations exacted as the condition of success at the bar, you must be animated by an enthusiasm for your profession — an enthusiasm born not merely of a passion for its distinctions, but nourished as well by an eager and insatiate delight in the study of the law. An avidity for the prizes of the profession is undoubtedly a powerful impulse in its pursuit, but the more constant as well as the nobler motive is a love for the profession itself. If you have embraced the law with the ardor of a genuine affection; if you be truly enamored of her austere and

rugged beauties; if you be resolved to woo her with the assiduity of a heartfelt devotion: be assured that you will win her, and that she will repay your fidelity by a revelation of charms which she discovers only to her unselfish suitors, and by a fruition of reward which no other profession so profusely lavishes upon its votaries. "If you love me you will find me out," was the animating assurance of the fair doctor of Padua; and Tully tells us that "without a passionate inclination and an ardor like that of love, no man ever achieved anything great, especially distinction as an advocate." Enthusiasm, I repeat with emphasis — enthusiasm in the study of your profession is the first and fundamental condition of success in its pursuit.

Enthusiasm, however, is but an incitement and support under the labors requisite for the attainment of the prizes of the profession.

It is possible by sheer force of audacity, and the trick of a ready wit and the persuasions of a facile and fluent oratory, to masquerade awhile as a lawyer, and attract to one's self a profitable clientele; but without solid and extensive learning in the profession one cannot achieve a real and enduring eminence at the bar, nor long impose a fictitious reputation upon the public. For soon the pretensions of the charlatan will be exploded by his misleading advice and the miscarriage of his causes; and his deceived and ruined clients will apply, perhaps too late, to some competent lawyer for the reparation of their fortunes.

How, then, are you to acquire this indispensable knowledge of your profession? Not otherwise, be persuaded, than by your faculties. It was the idle vaunt of an advocate of antiquity, as distinguished by vanity as by eloquence, that he could master the civil law in *three days;* but the conceit even of Cicero would have been abashed in the presence of the immense mass of jurisprudence extant in the age of Justinian.

With the progressive development of civilization society becomes more complex, and the relations and transactions of life indefinitely multiply; and as over every relation and transaction of life a principle of law presides, we need not marvel at the compass and intricacy of jurisprudence at this advanced age and in this enlightened country. The short and simple code which sufficed the necessities of our rude forefathers in the parent country is expanded to the bulk of the immense and elaborate system with which you are to grapple. But indeed no finite intelligence can comprehend completely the infinite volume and complexity of the law in this our day — nor, happily, is so impossible an attainment exacted of you. In practice you will — indeed you must — address and restrict yourselves to some special departments of jurisprudence, and while with the learning of these you will familiarly acquaint yourselves, of other outlying provinces you will be content to know the general scope and characteristic features.

But to whatever branch of the profession you

confine your practice, you must be conversant with the law of evidence and procedure, for the rules of evidence and procedure are prevalent over the entire field of jurisprudence. Limited, however, as your researches will be, you cannot become proficient in any department of the law except on the condition of diligent, devoted, conscientious study; and given an equivalency of intellectual endowment, the success of competitors for forensic distinction will be in the proportion of their respective attainments in legal learning.

Obviously, then, it is of supreme moment to the aspirant for forensic eminence that he pursue that method of study which shall yield him the largest results in useful and abiding acquisitions.

I assume that your diploma authenticates your acquaintance with the principles of jurisprudence; and yet throughout your professional career you will need to have habitual recourse to the works of the master authors. For perusal of such systematic treatises not only refreshes the memory, but is of especial utility in improving the style, in training the faculties, and in methodizing your learning. But for these results it is necessary that you be conversant with books of real merit only, lest by familiarity with inferior writers your learning be vitiated by error, your taste corrupted, and your habit of thought degenerate into a loose and desultory succession of unconnected propositions. I could name authors — of no mean pretensions too — whose works are so destitute of every literary

excellence, and of every logical process, that the only safeguard against their evil influence upon the mental discipline is in their dullness, which repels perusal. On the other hand, the literature of the law abounds in models and masterpieces of rhetorical art, of correct reasoning, and of scientific method — works which at once inform the understanding, delight the literary sensibilties, and develop the faculty of argument. To the too-frequent selection of works of the former class as text-books in our schools I impute much of the repugnance to the study of the law evinced even by men of superior abilities; and I cannot but believe that, if the student were introduced to the profession under the auspices of the great masters, the fascinations of their genius would impel him to its pursuit with interest and avidity.

It is, however, to the Reports that the practicing lawyer will have the most frequent and familiar recourse — mainly, no doubt, because there only can be found an authoritative exposition of the rule of law that is to furnish the solution of the case in hand, but also because of the value of the study of Reports in the scheme of professional training. I know not a more profitable or more pleasing intellectual exercise than is afforded by the reading of cases in our best Reports. In the first place, the statement of the case in an instructive lesson upon that most important and at the same time most difficult feat of forensic oratory — *opus oratorium maxime;* I mean a lucid presentation of the facts

upon which hinges the event of the litigation. Here we find omitted no single circumstance which bears upon the point in controversy; and no single circumstance introduced which, being irrelevant to that point, confuses the mind and, possibly, diverts it from the issue in agitation. Then, too, the essential facts are developed in due sequence and dependency, so as to conduct to the legal conclusion as by the force of an irrefragable syllogism.

From the darkness and confusion of chaos to educe light and order is the achievement of omnipotence; and, in like manner, from a mass of complicated and discordant circumstances to cull out and collect the essential elements into a symmetrical and complete body of fact, luminous as the orb of day, is the highest exploit of the human intelligence, as illustrated by a Mansfield and a Marshall. Without a perfect apprehension of the circumstances of a case,— analogous to the diagnosis of the physician,— it is impossible to subject it to scientific classification, and to know by what principle of law it is governed; and hence the ability to master and to marshal facts is the most useful and not the least admirable art in the equipment of the lawyer. Now by no means can this indispensable faculty be so effectually disciplined and developed as by study of the statements of competent reporters. The syllabus of such a reporter is in itself replete with interest and instruction — as an exposition in the shortest and clearest compass of the principles which legal reason evolves from the circumstances of

the case. But it is as an auxiliary in the culture of the logical faculty that the Report is of especial utility to the student, in so much that the great master of dialectics recommended Smith's *Leading Cases* as the best lesson in the processes of ratiocination. The subtle analysis, the compact force, the delicate perception of analogy, the comprehensive grasp, and the elegant diction exhibited in the opinions of a Folger and a Rapallo — I speak of the departed only — incessantly meditated and anxiously emulated, can not but communicate to the student somewhat of the same superlative power of legal argumentation, and somewhat of the same felicity of expression and illustration.

It is, then, by reading, by the study of books, and not otherwise, that the lawyer can so equip himself for his profession as to secure the reward after which he aspires.

But *how* shall he read? Is there an art of study by which the largest fund of information can be acquired with a minimum expenditure of labor? Obviously the same amount of mental power exerted during the same period, even by the same individual, does not always yield equal results. And the disparity is still more apparent between the acquisitions of different persons, though of equivalent capacities. It follows, therefore, that there are conditions propitious and unpropitious to fruitful study. Accordingly, from Quintilian to the present day teachers have been formulating precepts for the conduct of the understanding in the acquisition of

knowledge. The *one-book* maxim, *multum legere, non multa,*— little reading and much reflection,— was zealously inculcated by Hobbes and Locke, while on the other hand other instructors of equal eminence and authority have, both by doctrine and example, illustrated the advantages of omnivorous reading. My own observation is that, while the *helluo librorum* may be a prodigy of erudition, his capacity of reception is developed at the expense of his active powers, and that he is not apt to be expert and efficient in the use of his materials. Obviously, as a thorough mastery of a few books in each department of the law implies not only readier but ampler acquisitions of learning than can be accumulated by a discursive expatiation over a multitude of volumes, he who perfectly knows Kent's *Commentaries,* for example, has in his head more law than is at the instant command of any man in the profession; and then his learning, instead of being an undigested mass, is so classified and distributed in the memory, and is so incorporated into his mental constitution, as to be always available for use and application.

But by what method may the student best fix and fasten in his mind the matter of the volumes he reads? One great authority, Dr. Johnson, advises trusting to memory alone,— arguing that a memorandum only transfers the impression to paper, and so discharges the mind from the obligation of recollection,— while Professor Bain inculcates the utility of abstracts and annotations for the acquisition of

a clear and firm conception of the contents of the book. These two processes, you will remember, were combined in the education of the prince of orators, who, by transcribing Thucydides *eight times,* not only held the entire work *verbatim* in his mind, but absorbed and assimilated every particle of intellectual nourishment to be derived from that rich storehouse of eloquence and philosophy.

For a plan of study my own experience suggests that one subject at the time be grappled and mastered, and that to this end you read the best author by whom the topic is treated, in connection with the principal cases by which it is illustrated and applied; and that then you reproduce from memory a synopsis or summary of your acquisitions. By this procedure you will at once concentrate your faculties, systematize your learning and imprint it indelibly upon the mind.

And as to the method of reading, I would inculcate that you pause upon a sentence until you completely apprehend its meaning, and upon every argument until you clearly perceive its processes; for not to understand is not to learn; and, besides, an habitual acquiescence in dim and vague conceptions inevitably darkens and debilitates the intellect. Hence I would earnestly admonish you of the futility and evil of excessive study, since when the mind is fatigued it grasps nothing firmly and tenaciously; and the habit of listlessly wandering over the pages of a book is fatal to all intensity of application and capacity of acquisition. Only when the

attention is awake and the faculties fresh and alert can you read with effect, and to read without result is at once a waste of time and a depravation of the intellect. The moment you perceive that the mind refuses to take hold; the moment that the spur is necessary to stimulate its flagging energies; the moment you feel a vacillation and vagrancy of attention,— that instant lay aside your book, and for refreshment betake yourself to that best of restoratives, the delights of literature. For repose is not always recreation; and when the reason is weary it is best recuperated by the play of the faculties of taste and imagination.

And yet, after all, it is a distressing reflection to the student how little he remembers of what he reads. It is the remark of a celebrated author — himself a man of uncommon erudition — that "he who remembers most, remembers little compared with what he forgets"; but he adds the encouraging admonition — "Do not resign all hopes of improvement because you do not retain what even the author himself has perhaps forgotten." So important a faculty is memory, that Quintilian esteemed it the equivalent of genius,— *tantum ingenii quantum memoria,*— and to the lawyer it is perhaps the most indispensable of mental powers.

Many expedients are employed to fix the results of reading in the mind; but, after all, "the true art of memory is the art of attention." What we have read with interest we remember — and we remember it because its interest engaged our attention.

The vivid and enduring recollections of childhood and the forgetfulness of old age are equally proverbial, but the boy remembers because the interesting novelties of the world absorb his attention, and the octogenarian forgets because he has ceased to observe with interest the, to him, familiar and fading incidents of life. If, therefore, you concentrate your attention upon the book in hand, and afterward revolve its contents in frequent meditation, you will retain them without the aid of any artifice of mnemonics.

In that invaluable guide to the student,— Locke's tractate *On the Conduct of the Understanding,*— it is written that "reading furnishes the mind with the materials of knowledge, but it is thinking that makes what we read our own"; to which add Bacon's injunction of frequent conference on the subject of our reading, and you have the precepts of the best teachers on the art of study.

Be assured that a system of study conducted on these principles and pursued with diligence will soon sufficiently accomplish you in the learning of the profession.

Equipped now with competent learning in the profession, you come to apply your knowledge in the conduct of causes. But here precepts are of slight utility for your guidance, since skill in the trial of causes is not to be taught by art, but is to be acquired only by experience. The dearth of treatises on the subject attests their uselessness.

It is a curious fact, by the way, that the best rules

for the examination of witnesses were propounded nineteen centuries ago by the author of the *Institutes of Oratory*, and in modern times by a learned prelate of the Church of England — I mean Archbishop Whateley, in his book upon rhetoric.

It is obvious to remark that, before engaging in a trial, you must be thoroughly master of the law and the facts of the case; that you know in advance what your own witnesses will testify; and, if possible, anticipate the evidence of your adversary; that you never propound a question without a definite and predetermined purpose; that upon cross-examination especially you ask no question an answer to which may harm more than it can help you; that you avoid leading an adverse witness to repeat his testimony in chief, for most certainly he will strengthen it, and with the effect of a recoil of your own engine; that you preserve throughout perfect self-possession and control of your faculties; that you be not prematurely elated by an apparent advantage, nor depressed or embarrassed by a sudden discomfiture; that you watch the vicissitudes of the trial with a sleepless vigilance; that you keep steadily and constantly in view the object of your exertion, namely, the success of your cause; that to that end all your efforts — every look, every action, every word — be directed; that toward witnesses, hostile as well as friendly, you be uniformly courteous; that with your opponent you observe all the punctilios of chivalric debate; that to the jury you be respectful but not adulatory, and to the Court

deferential but not obsequious; above all, that you maintain a perfect equability of temper, for when an advocate loses his temper he has already lost his cause.

The constituent elements of forensic genius are identical with those of the military — "untroubled perspicacity in confusion, firm decision, rapid execution, providence against attack, fertility of resource, and stratagem."

With these very general — and because general, sterile,— precepts for the conduct of trials, I pass to the consideration of the crown and consummation of professional excellence — I mean forensic oratory.

That the eloquence of the bar has lost its ancient luster is the mournful refrain of the *laudator temporis acli.* Where now, he cries, are the Pinkneys and Wirts, the Emmets and Hoffmans, whose orations, enriched by the spoils of literature and radiant with the colors of fancy, and glowing with the fires of passion, and resounding in the accents of a soul-stirring declamation, held enraptured audiences as by a spell of enchantment? And because of these none now survives, he concludes that forensic oratory has declined from its high estate; and because such eloquence is no longer extant, he infers that eloquence at the bar is no more in request. But the inference is invalidated by the assumption of the premise. The fact is, not that the eloquence of the bar has deteriorated, but rather that it has undergone a modification. When men were more under

the dominion of emotion and imagination, they were affected by a style of oratory very different from that which prevails with a mind dominated by reason and intent upon the prosiac realities of every-day business; but it is still true that eloquence is the art of persuasion, and that persuasion is the specific function of the advocate.

The truth, then, is not that eloquence is a useless instrument for the lawyer, but that his purposes now require a different species of oratory from that which his predecessor found of such prevalent power; and that, instead of the passionate appeal and tropical luxuriance of a former day, he perceives that sobriety of statement and severity of logic are of more efficacy for conviction and in swaying enlightened and disciplined judgments to his ends.

Nevertheless these are precisely the characteristics of the loftiest strain of forensic eloquence — for where else are displayed so close a grapple of the subject of discussion, such argumentative force, such austere disdain of tinsel embellishment, such concise simplicity of expression, as in the immortal oration on the Crown? And, in Erskine's argument in support of the Rights of Juries, the same quality of pure intellectual power, the same contempt of meretricious ornament, and the same abstention from declamatory appeal, are conspicuous; and yet this address to the Court is the highest effort of forensic oratory.

Concede, then, that there is no longer a call for

mere flourishes of rhetoric; still in the contentions of the bar at the present day there is ample scope and exigent occasion for eloquence in the truest sense — the power of persuasion.

The ultimate object being to gain your cause, then, whether that end be to be compassed by conviction of the reason or by influence upon the feelings, it is an indispensable condition of success that you secure and retain the attention of the tribunal addressed; otherwise the most powerful argument and the most moving appeal will be but an idle expenditure of breath. Now, nothing so effectually arrests attention as a visible earnestness of manner, revealed in tone, look and gesture — a passion for your cause, subdued but palpitating in every organ of expression. A frigid indifference in the speaker communicates its own languor to the hearers; but his vivacity inflames them with a responsive animation. Mere intensity of feeling, however, will speedily fatigue and repel attention unless it be retained and rewarded by a commensurate excellence in the form and substance of the discourse.

A lucid and logical arrangement of topics — so perspicuous as instantly to reveal their own significance and force; a diction choice but not fastidious, rich yet not redundant; an exhibition of learning short of pedantry, but sufficient for information; a concatenation of argument, compact and convincing; and an elocution graceful, animated, and earnest — these are the qualities of speech by the concentrated spell of which even the most austere and im-

patient court will be fascinated into an involuntary thralldom.

With the learning requisite for the material of argument your professional reading will supply you; logic will teach you the art of sound reasoning; moral philosophy will unveil to you the mysteries of the human heart and enable you to touch the springs of human passion; that copious and elegant vocabulary which is not only the fit and felicitous vehicle of worthy thought, but is in itself a beauty and a power, you will acquire by habitual converse with the classics of our language; the wealth and delicacy of fancy from which even a forensic disputation may borrow appropriate embellishment and interest, aye, and efficacy too,— for it is the feather that wings the arrow to the mark,— this exquisite charm of oratory will be imparted to you by the munificent matters of romance and poesy.

The aim of oratory being immediate impression upon the audience, it results that its excellence is to be measured by its effect, and not by its conformity to the canons of criticism. The composition may be brilliant as a literary performance and yet altogether ineffectual as an oral address — it may be magnificent, but not oratory. Such were the splendid disquisitions of Edmund Burke — read even now with infinite admiration of their deep philosophy, their gorgeous imagery, and the imperial beauties of their style, but heard at the time only by the few to whom the dinner bell did not offer more persuasive attractions. Such, too, was

the speech of Sir James MacIntosh in defense of Peltier, which, superb as an essay on the freedom of the press, was so devoid of oratorical effect that it failed to avert the conviction of a client in whose favor concurred the pride of patriotism and the indulgent sympathies of the jury.

Obviously a composition submitted for perusal in the seclusion of the closet, addressed to a cool and critical judgment, and subject to the recurrences of revision and the pauses of meditation, exacts a perfection of structure that shall satisfy the scruples of a prolonged and patient scrutiny, and allows of a subtility of argumentation, an elliptical brevity of expression, and a subdued moderation of tone and color which would be altogether inappropriate in spoken discourse; spoken discourse, of which the meaning must be apprehended in the instant or else be lost in the onward rush of thought and feeling — in which the nicer and more delicate felicities of style either escape observation or provoke reproof for lack of harmony with the serious business of the occasion, and to which an exaltation of passion is communicated by the contagious sympathies of the audience.

So diverse and incompatible indeed are the requisites of written and oral composition, that Fox's test of a speech was, Does it read well? for if it reads well, then it is not a good speech.

And here permit me to mention a circumstance which, as I conceive, largely explains the decadence of spoken eloquence at the present day — I mean the

presence of the stenographer. It is to him rather than to the audience that the orator addresses himself; and, solicitous about the critical judgment of the newspaper reader, he is inattentive to the conditions of immediate effect upon his audience. A gentleman of long service in the Federal Senate tells me that it is a common remark that the debates in secret session are far superior to those in public, and the cause is the absence of the reporter.

The characteristic qualities of oral eloquence, especially at the bar, are dictated by its end and occasion, namely, to sweep along the judgments and the feelings toward a definite conclusion; and hence that "agonistical" style, as the father of philosophical criticism distinguishes it — *negatively,* an abhorrence of the ornate and the glittering, of the pompous and the florid, of brilliant paradox, of turgid nonsense, of all the elaborate artifices of rhetoric; *positively,* a steady and swift pursuit of the object in view, impassioned appeal, indignant exclamation, defiant interrogation, argument condensed into self-evident and epigrammatic propositions, rather than drawn out into a chain of consecutive ratiocination, amplification, and repetition under varied aspects of the salient points, a homely and idiomatic diction — all quivering with the vivacity and animation of an earnest and glowing spirit — these are the qualities of speech which constitute true and effective eloquence.

Now, how are these excellencies of oratory to be acquired? For if it be true of the poet that he is

such by the inborn prerogative of genius, it is otherwise with the orator; who, whatever his native endowments, must still be disciplined into proficiency by assiduous culture; and who on the other hand, howsoever embarrassed and impeded by original infirmities, may yet, like Demosthenes, attain by arduous endeavor to the highest perfection of eloquence. Of all our faculties, probably that of effective public speech is the most susceptible of growth and development, and like other faculties, it is best cultivated by use and imitation.

It was by speaking at least once every night during the session of Parliament that the greatest of debaters declared that he acquired his unrivaled ability.

If, then, you would become an orator, be persuaded that only by practice in public speaking can you command the self-possession, the prompt conception, the fluency and felicity of expression and the grace of delivery that are essential to the character.

Practice alone, however, only gives freedom and facility to the operation of your powers; and if you would augment those powers and wield them to the utmost effect, you must enrich and invigorate yourselves from the resources of the great masters of oratory. A constant contemplation of the ideals of eloquence not only exalts the mind to a kindred emulation, but insensibly instructs it in the arts of an equal achievement.

So, by the play of its pinions in preparatory ex-

cursions, and by watching the mother bird in her loftier flights, the young eagle is trained and emboldened to pierce the empyrean and soar amid the glories of the highest heaven.

Happily for every purpose of instruction and emulation our literature is rich in all the models of oratory. In forensic eloquence the arguments of Erskine, in Parliamentary eloquence the speeches of Macaulay, in pulpit eloquence the sermons of Robert Hall, in popular eloquence the harangues of O'Connell — exhibit to us all the resources of oratory in the utmost plenitude of genius.

Nor need we travel abroad for examples and illustrations of forensic oratory in its highest perfection; for in the sublime passion of Patrick Henry, in the gorgeous vehemence of Choate, in the brilliant and abounding fancy of Prentiss, and in the majestic simplicity of Webster, we find at home every beauty and every power of eloquence, displayed with an effect not inferior to the achievements of the mighty masters of antiquity.

But whatever the intrinsic beauty and power of the production, it is still an inert energy until oral utterance gives it the life and movement of an actual force.

The characteristic excellence of a speech, as distinguished from a written composition, consists in the delivery — and assuredly the whole effect of a speech depends upon its delivery. Hence the emphasis with which, by practice as well as by precept — by practice in the untiring endeavor to catch

every grace of elocution; by precept in inculcating action as the *first* and the *second* and the *third* requisite of effective eloquence — hence the emphasis with which the prince of orators urged the importance of delivery in the art of eloquence. And his great adversary bore equal testimony to the effect of delivery, when to the Rhodians, who applauded his rehearsal of Demosthenes' oration, he exclaimed, "Could you have heard *him* deliver it!"

Of the efficacy and value of delivery — comprehending tone, look, and gesture — we have an interesting example in the preaching of Whitefield, whose sermons, though intrinsically of little or no worth, caught from the magic of his action and his voice an eloquence that thrilled the skeptical Bolingbroke, that extorted applause from the fastidious Hume, and that warmed even the cool and cautious Franklin into a glow of involuntary enthusiasm.

Precepts, I fear, are of little avail to the attainment of excellence in delivery; but these are too obvious to escape remark — distinctness of articulation, correctness of pronunciation, due modulation of voice, earnestness of manner, and a vivid animation of action.

By all means in speaking banish every thought of self, and abandon yourself to the enthusiasm of the argument; for though you may be thus betrayed into some eccentricities or extravagances, still they are your own, they are true to nature, and 'tis the touch of nature that kindles the sympathy of a kindred emotion. A frigid formality of delivery, however

conformable to the rules of art, is incompatible with all the effects of eloquence. Especially abstain from any verbal preparation of your discourse; for, besides that, if you have the thought it will leap into life by the appropriate expression — *provisam rem verba sequenter.* The least appearance of utterance from memory is fatal to the spontaneity in which consists all the enchanting illusions of eloquence.

Animated by a generous enthusiasm for the law, expert in the tactics of a trial, enriched by judicious study with the learning of the profession, and accomplished by appropriate culture in the art of eloquence, you will win the renown extolled by the great master as the consummate distinction of the bar — of being " the first lawyer among orators and the first orator among lawyers."

Gentlemen, the calling with which you have chosen to link the destinies of your life is indeed a noble vocation. Charged with the conservation of the highest and dearest interests of humanity, — the property, the character, the happiness, the liberty, the life of the citizen,— the consciousness of so lofty a commission cannot but impart to the profession a commensurate elevation of thought and expansion of sympathies.

Constrained by the variety of problems submitted for its solution to expatiate over the whole empire of civilization, it is dignified and adorned by all the learning within the reach of the human intelligence.

Its end and aim being the chastisement of wrong

and the vindication of right, its abstract studies and its habitual practice alike conduce to the education of the moral nature in conformity with the highest and purest ideals of justice.

The scourge of triumphant iniquity and the refuge of oppressed innocence, its transcendent functions require an ability which no craft can baffle and an eloquence which no heart can resist.

To be worthy of association in so noble a guild is proof sufficient of genius and virtue; and so to be worthy, I doubt not, will be your endeavor throughout the career upon the commencement of which I beg to bestow my heart-felt benediction.

VII

INFLUENCE OF VIRGINIA IN THE FORMATION OF THE FEDERAL CONSTITUTION

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[The address before the Virginia Bar Association, published by the Association, is inserted in this collection upon the supposition that the reader will be interested in the evolution of the Federal Constitution as framed by the fathers and expounded by Marshall; not, as it is now become, the supreme autocracy of the Executive, usurping the functions of other departments and nullifying the essential rights of the States. Surely, it is opportune to recall the fundamental postulates, that the departments of Government are co-ordinate and independent; and that the principle of our political system is "Indestructible union of *indestructible States.*"]

Mr. President and Gentlemen of the Virginia State Bar Association

Although I live under another sky, remote from my native State, my heart, unchanged, is still true to the Commonwealth of Virginia. Her renown I cherish as a priceless heritage, and any derogation from her glory I feel as a filial bereavement.

The eminence already attained by the American Republic in the rank of ruling Powers, its manifest destiny of illimitable expansion and indefinite duration, and the coincidence it exhibits of public order with individual freedom, naturally attracts attention to the policy of which the effects are so prodigious and beneficent. Hence the interest, everywhere

apparent, in the Constitution of the Federal Government. Political philosophers the world over have subjected it to the keenest criticism; and yet it challenges unbounded and well-nigh universal applause. "It is the greatest refinement in social policy," declares Lord Brougham, "to which any state of circumstances has ever given rise, or to which any age has given birth." With equal enthusiasm Mr. Gladstone pronounces it "the most wonderful work ever struck off at a given time by the brain and purpose of man." And Mr. Bryce, in a strain of less fervid and more discriminating admiration, esteems it "above every other written constitution for the intrinsic excellence of its scheme, its adaptation to the circumstances of the people, the simplicity, brevity, and precision of its language, its judicious mixture of definiteness in principle with elasticity in details."

A rivalry of pretension to the authorship of a system of government so successful and so celebrated was inevitable, as time effaced the traces of its origin. Immediately after the event, indeed, the credit of its construction was awarded to Virginia by common consent; but latterly indications of an effort to despoil her of the distinction are visible in many directions. The task I propose to myself, in requital of your kindness, is to reassert the rightful claim of Virginia, and to vindicate it by the unimpeachable evidence of history.

The genesis of the supreme law, I assume, is an interesting subject of research with lawyers; proof that the Federal Constitution is essentially the off-

spring of Virginia cannot be an ungrateful offering to Virginians. If I recount incidents familiar to Virginians, they are incidents of which Virginians should never be weary in the recollection.

For a time, as implied by Mr. Gladstone, the notion prevailed that the Federal Constitution was the conception and achievement of the convention of 1787; but now the accepted and the more scientific theory is, that it was not a creation, but an evolution — the normal and inevitable outgrowth of the antecedent political conditions of the country. Contemplated, however, in either aspect, whether as a design or a development, the influence of Virginia in its formation is equally conspicuous and decisive. If we view it as the product of the past, it embodies the spirit, the ideas, and the institutions of Virginia. If we take it as a contrivance of policy, we still see it formed and finished by the hand of Virginia.

The colonists of Virginia were English, and they brought with them from their ancestral home the political instincts and traditions of that masterful race. In 1619, a year before the *Mayflower* skirted the coast of Massachusetts, the Virginians inaugurated representative government on the American continent, "and this example," says Story, "of a domestic parliament to regulate all the internal concerns of the country was never lost sight of, but was afterward cherished throughout America as the dearest birthright of freemen." Insisting upon the privilege of self-government, on the 21st of June, 1621, the Virginians extorted the concessions that

" no orders of court shall bind the said colony unless they be ratified by the General Assemblies." They asserted the right of self-taxation and control of the public purse, protesting, in 1624, that " the Governor shall not lay any imposition upon the colony, their lands or commodities, otherwise than by the authority of the General Assembly, and employed as the said Assembly shall appoint." Though loyal to the King, in 1635 they " thrust out " his governor for encroachment upon their rights, and substituted successors of their own choosing. Nay, after the downfall of monarchy they confronted Cromwell himself, and only yielded to his usurpation upon an honorable capitulation, acknowledging their submission as " a voluntary act, not forced or constrained by conquest," and guaranteeing them " such freedom and privileges as belong to the freeborn people of England." After the Restoration they broke out in open rebellion against the oppressions of government, and anticipated by a century the final and victorious struggle for the liberties of America. On the untimely death of their leader — the well-born, the gallant, the accomplished, the eloquent Bacon — their revolt was quenched in blood; but, even so, without any surrender of their chartered rights.

A long period of repose ensued, during which Virginia accumulated wealth, multiplied in population, reinforced her native virtues by incorporating in her community the Scotch-Irish Presbyterians and the German Lutherans of the Valley, and em-

bellished her material form with the social graces and the refinements of learning. And yet the energies of her nature were not relaxed by the luxuries of an epicurean life; but, instead, were braced and disciplined in combats with her savage neighbor and conflicts with a more formidable foe. The victory of Point Pleasant and the defeat on the Monongahela attested equally her readiness for the imminent grapple with the power of Great Britain.

So, in 1765, English as she was in affection and upon principle, by her resolutions against the Stamp Act, testifying her ancient and unalterable attachment to self-government, she sounded to her sister States the signal of resistance to foreign aggression. In 1773, by her committee of correspondence, she invited them to union in the common cause; and she insured that union by a call of the General Congress. Her leadership in the great movement was recognized by the appointment of Peyton Randolph to the head of the civil and George Washington to the head of the military establishment. On the 15th of May, 1776, she instructed her delegates in the Congress to propose a definitive renunciation of allegiance to the British Crown; and, accordingly, on the 7th of June Richard Henry Lee, in her behalf, moved the resolution that "the united Colonies are and ought to be free and independent States." The resolution passed, Thomas Jefferson announced the advent of the new nation in his immortal manifesto. Meanwhile, on the 15th of May, 1776, Virginia alone, and of her own volition, outrunning the

initiative of Congress, abjured her old allegiance and assumed the attitude of an independent State. On the 12th of June her Declaration of Rights and, on the 29th, her plan of government were adopted — the first instance in recorded history of a written constitution for a free and independent community enacted by the sovereign will of the people.

This memorable performance, be it observed, was not anticipated by the so-called constitutions of New Hampshire and South Carolina; because, first, they did not purport to be systems of government, but merely provisional expedients, a sort of *modus vivendi* —" to continue," as they are careful to protest, " only during the present unhappy and unnatural contest with Great Britain; " and because, secondly, as organic laws they were essentially defective in collecting the total political power in a single legislative body, and in providing no security for the inalienable rights of the people.

Far different was the constitution of Virginia. Avowedly the fundamental law of a free and sovereign State reposing ultimately on the basis of the popular suffrage; with a single executive, a bi-cameral legislature, an independent judiciary, and a Bill of Rights defining and safeguarding the immunities of the citizen, it presented a system of republican polity perfect in principle and complete in detail — the grand original of all subsequent State constitutions, and the model, as will be seen, to which the architects of the Federal government had recourse.

In order to an adequate appreciation of the

agency of Virginia in the formation of the Federal Constitution, it is requisite that we recall two events in her history under the Articles of Confederation.

The acceptance of those Articles was hindered by the reluctance of the recusant States to be overborne by the preponderance of Virginia resulting from the disproportionate extent of her territory, and by a desire to partake the benefit of that territory. They demanded, as the condition of their accession to the confederacy, that this domain should be the dowry of the nation, instead of the invidious possession of a single State. Now, the right of Virginia to the Northwestern territory was clear and incontestable, because held by the twofold title of charter and conquest. Waiving the claim by charter, still the territory was the acquisition of her own valor and genius; and this, too, while she was contributing her contingent in troops and supplies to the maintenance of the common cause. The expedition of George Rogers Clark was her enterprise, was sustained by her resources, and was conducted to a successful issue without succor, or sympathy even, from the States which now coveted an equal participation in the advantages of the conquest. In her grasp on the conclusion of peace, it was assured to her by the principle of the treaty — *uti possidetis*. It was a region not only of immense expanse, but of a salutary climate and fabulous fertility; and had Virginia, yielding to selfish motive, declined to contribute it to the Union,

her scepter would have had an empire for its support. But such illiberal propensity was not in her nature; instead, rather a generous disdain of personal interest in competition with the claims of country — and accordingly this princely domain she offered an oblation on the alter of patriotism. Thus did she sacrifice to the common weal the domain out of which were carved the States of Ohio, Indiana, Illinois, Michigan, and Wisconsin. By this act of unparalleled magnanimity Virginia not only removed an obstacle to the completion of the confederacy, but supplied an imperious motive to a closer and firmer compact between the States. With such a wealth of empire the common property of the States, which one would forfeit its portion by secession from the partnership? Indeed, this gift by Virginia was a mighty cement of union. And more, in order to an effectual rule over so vast a region, a larger and more energetic action by the general government was necessary;— to which, again, a reformed and reinvigorated constitution was an indispensable condition.

So it was that Virginia held together the States during the critical period of the confederation, and by the application of an urgent interest spurred them on to a more intimate connection.

By another act of less but still important consequence, Virginia contributed to the aggrandizement of the Federal power. Under the guidance of Jay the Eastern States signified their assent to the occlusion of the Mississippi River by the Spanish gov-

ernment. This highway of access to the ocean closed to the enterprise of the great Valley, its treasures were locked up in sterile torpor; population repelled; a barrier interposed to the westward expansion of our empire, and the American republic dwarfed and diminished to an attenuated thread of States along the Atlantic seaboard. But Virginia, with a larger patriotism, and a more prophetic foresight, by her relentless resistance intercepted the ill-omened policy and secured eventually to the nascent nation a continent for the consummation of its ultimate grandeur.

Such now were the magnitude and variety of interests soliciting the guardianship of Federal authority, that a stronger government became an instant and imperative necessity.

The Articles of Confederation imported nothing more than a "league of friendship"; and although not an altogether inadequate bond of union under the pressure of war, their insufficiency on the return of peace was a disquieting apprehension with thoughtful men. While the public spirit was aglow with patriotic fervor and the exigencies of the common cause forbade either languor or discordancy in the exertions of the associated States,— with all the resources of the country collected in the grasp of the military chieftain,— even a league of friendship might avail for the purposes of an efficient administration. That peril past, that spirit extinct, and that energetic command relaxed, each State relapsed into a distinct community intent

only upon its own interest and indifferent to the general welfare.

Immediately on the close of the war the futility of the existing arrangement was disclosed, to the dismay of all patriots. Then was seen the utter incompetency of the confederation to the ends of government. With no executive and no judiciary; without power to enforce its requisitions, to raise armies or collect revenues, to fulfil its engagements at home or abroad, to regulate commerce or even to maintain its own dignity against rabble outrage, — it fell at once into helpless exhaustion and universal contempt.

Obvious was the alternative of either a firmer union and a stronger government on the one hand or on the other anarchy and ruin. The event was long in suspense; but ultimately Virginia inclined the balance to the side of safety, by a peremptory demand for a reformed Constitution and an invigorated government.

The devotion of her magnificent domain to the common country, as already shown, supplied a motive of union and an incentive to a sounder system. But, coincidently, Washington imparted another and a mighty impulse toward a regenerated Constitution. Having conducted the war to a triumphant close, and having exhibited in his character all the virtue and all the wisdom of which humanity is capable, his reward was the universal esteem and affection of his countrymen, and an irresistible ascendancy over their inclinations and opinions. His

judgment was their oracle; his will their law. The French minister declared that, in determining the nation to a stronger system, his word was of more weight than the collective influence of all other authority. Foreseeing the vanity of all he had accomplished and the relapse of the country under despotism unless the Union were reorganized, he exerted himself with indefatigable activity to inculcate the necessity of a new constitution. This object he pursued unremittingly, by personal discourse and private correspondence; and with commensurate effect. But his crowning act in disposing the nation to a reform of the Constitution was his circular letter to the governors of the States on retiring from the command of the army, in which, with importunate patriotism, he pressed the need of a stronger government. They all made response in the spirit of Trumbull, of Connecticut, who extolled "this last address of Washington as exhibiting the fundamental principles of an indissoluble union of the States under one Federal head." Communicated to the several legislatures, the appeal fired the heart of the nation to a passionate clamor for a new constitution.

As in every crisis of American history Virginia had advanced to the front, so now she again took the lead in the march toward a renovated government. Simultaneously with her cession of territory, she imparted to the Congress the power of impost; thus, in the language of Mr. Bancroft, "marshaling the United States on their way to a better

union." Still more decisively, Virginia summoned the Convention to recast the Constitution; and Virginia first commissioned delegates to that auspicious assembly.

Thus, on a review of the successive stages in the development of the republican system in America, we observe that it was Virginia who set the example of representative government and colonial autonomy; that it was Virginia who gave the first signal of resistance to British aggression; that it was Virginia who initiated union in the common cause; that it was Virginia who first adjured allegiance to the English Crown and instituted a republican polity by the act of her sovereign will; that it was Virginia who first proposed to the sister colonies a Declaration of Independence; that the sword of one son made good what the pen of another had proclaimed; that for the sake, even of an imperfect federation, she surrendered a domain of imperial magnitude; that she opened a way for that career of progress and expansion which the republic has since so gloriously pursued; that on the collapse of the confederacy she rescued the country from chaos by summoning the States to the reconstruction of its fundamental law; in short, that Virginia stimulated the desire, and provided the means, and prompted the effort, and furnished the ideal, for the Federal Constitution of 1787. We are now to see her in the act of making it — moulding its form and fashioning its features, by her consummate statesmanship.

Forecasting on the eve of the convention the probable influence of Virginia on its action, her commanding attitude in the confederacy was a significant factor. In deference to her superior wealth, her greater population, her historic primacy among the States, and her foremost part in the achievement of independence, the initiative and ascendency were accorded to her without dissent. "As the Convention had met," says Hildreth, "on the invitation of Virginia, it seemed to belong to the delegates of that State to start the proceedings."

The group of distinguished men at the moment eminent in her councils certified her fitness for the great undertaking. Washington, Jefferson, Madison, Mason, Henry, Marshall, Monroe, and other names of hardly inferior note formed a galaxy of genius that would have lent luster to any age and any country.

The approved abilities and ripe experience of the men whom she especially commissioned for the work gave assurance that it would be done by them and be well done. Washington, in whose unerring wisdom the nation reposed its surest trust,—"I know," wrote Knox, "your personal influence and character is the last stake which America has to play"; Randolph, delegate in the Congress of the confederation, and successively Attorney-General and Governor of the Commonwealth; Blair, long a burgess of the Colony, member of the convention of 1776 and of the committee which reported the plan

of State government, member of the Court of Chancery and Chief Justice of the General Court; Wythe, strenuous champion of independence in the House of Burgesses, signer of the Declaration in Congress, with Jefferson and Pendleton framer of the reformed legislation for the State, and member of the Court of Chancery; Madison, also member of the Convention of 1776 and of the Committee to report a constitution for the State, member of the Legislature and of Congress, active and able and eminent in every station; Mason, author of the first constitution for an independent American State, and of the first Bill of Rights ever formulated for a free community; ranking, by these achievements, with the most illustrious law-givers of the world: — such were the characters who, in behalf of Virginia, assumed the task of reconstructing the Federal government.

The problem before the Convention was complex — namely, first to frame a system of polity for the nation as a unit, as an integral personality; and, secondly, to adjust and reconcile the Federal supremacy with the sovereignty of the States.

The primary task pertained to the form of government and its operation upon the citizen; and as such simply, it involved no novelty of invention and no difficulty in the execution. That the structure of Federal government should be republican was the imperative dictate of the political experience of the country. It was against the oppression of monarchy that the colonies had revolted, and republi-

can institutions were already prevalent in every State.

For the particular modification of the republican principle best adapted to the situation of the States the Convention was not at liberty to look abroad; nor, had it so explored, would anything have been discovered propitious to its purpose. During its deliberations the Swiss Confederacy was cited, only to be condemned; the oligarchic republic of Venice was tottering to its fall; and the Dutch institutions were signaled as a ruin to be avoided rather than an example for imitation.

In origin, therefore, the form of the Federal government was of necessity American; and its model was revealed in the then existing institutions of the States — a conclusion to which, notwithstanding the thesis he maintains, Dr. Ellis Stevens is constrained by his researches into the sources of the Federal Constitution. "After all," he admits, "American political experience was the principal factor on which the Philadelphia Convention relied in its constructive task"; and "the convention practically took the model of colonial government as it had long and familiarly existed, and as adapted in the State governments then freshly set up, and applied it to the nation." And Dr. Boregeaud affirms with emphasis that "the institutions of the States are the edifice itself of which the Federal Constitution is but the completion."

We have already seen that, in 1619, Virginia furnished the Colonies with the exemplar of represen-

tative government, and that Virginia, first of the States, instituted a republican system on the foundation of a written Constitution. This Constitution was the original of the organic acts of the other States; and it, with its progeny, was now before the Convention to supersede all speculative experiment by a model of wise design and demonstrated efficiency. Its authors — Mason, Madison, and Blair — were on the floor of the Convention to commend it for adoption. That, in fact, it presented the pattern after which the Federal Constitution was framed is attested by their substantial identity in the essential attributes of republican polity — a single executive, a legislature of two chambers, an independent judiciary, popular representation, and official responsibility.

While the form of representative republican government adopted by the Convention is but a duplicate of the system established by Virginia in 1776, so much of the Constitution as regulates the relations of the Union to the States is an absolutely original conception.

Of alliances offensive and defensive, of leagues of friendship such as the Articles of Confederation, and of Federal associations with varying degrees of intimacy, examples were not wanting either in ancient or modern times. But here is a system at once Federal and national; its constituents, States as well as individuals, acting coercively within the limits of the several sovereignties, yet so acting without restraint upon local autonomy or abatement

of its own efficiency, and without peril of collision between the concurrent forces. The expedient by which so felicitous and so marvelous a result was attained consists, not, as commonly taught, in a partition of powers between the Federal and the State governments,— for each retains its faculties in all their plenitude,— but in the distinction of objects to which those powers are directed; Federal functions being limited to purposes of national policy, and State functions restricted to the ends of local economy; and in an effectual provision against conflict between the co-ordinate jurisdictions by according precedence and supremacy to the Federal authority.

" This contrivance," says Judge Hare, " so far as my knowledge extends, has no precedent in political history." With equal emphasis Professor Fiske exclaims that " thus at length was realized the sublime conception of a nation in which every citizen lives under two complete and well-rounded systems of law — the State law and the Federal law, each with its legislature, its executive, and its judiciary, moving one within the other, noiselessly and without friction. It was one of the longest reaches of constructive statesmanship ever known in the world."

By whose genius the solution of the hitherto insoluble problem of national unity with local self-government was achieved authentic history demonstrates to the world. In advance of the convention Madison sketched in outline a project of Federal union, which, approved by his colleagues, was pro-

pounded as the plan of the Virginia delegation. Two competing plans, the one of New Jersey and the other of Hamilton, were submitted; but, these cast aside with slight regard, the Convention proceeded to construct a system on the principles of the Virginia programme. After four months of earnest and exhaustive discussion the Virginia scheme emerged from the stormy debate altered in detail, but identical in substance; and, so modified, was promulgated by the Convention for acceptance by the States. That " Madison gave the outline of the plan which the Convention adopted," and that " the fundamental conception of our partly Federal, partly National government, appears throughout the Virginia plan as well as in the Constitution which grew out of it," are the explicit concessions of Hare and Fiske, critics from whom Virginia may not expect anything of exaggerated commendation.

Thus did Virginia, acting upon the initiative allowed to her hegemony in the confederation, introduce to the Convention the true theory of Federal government; and thus is the Constitution of 1787 but the articulation of the principles she propounded. Nay, more, in the form of its acceptance by the States,— that is, by ratification in sovereign convention of the people as proposed by Madison,— she gave it a sanction and a stability of which it would have been destitute had a mere legislative approval, as suggested by Hamilton, been the only basis on which it reposed.

Nor did Virginia's contributions to the Federal

structure cease with its completion by the Convention. As transmitted to Congress for submission to the people, it was wanting in an essential safeguard for the rights of the citizen and the State against Federal encroachment. But this defect was speedily repaired, and repaired from resources supplied by Virginia.

Together with her acceptance of the Constitution she communicated to Congress a series of propositions which she insisted should be incorporated with it, as guarantees of the rights of the States and the liberties of the people. Her claim of protection to the States was conceded in the Tenth Amendment, providing that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." And in the first *eight* Amendments we find that each and every specification of popular immunity is but a repetition — occasionally in identical terms — of the principles embodied in the Bill of Rights proposed by Virginia. True, some of these principles other States had submitted as a necessary part of the fundamental law; but, then, those States had adopted them from George Mason's Bill of Rights — the earliest not only, but the most comprehensive and the most luminous formula of freedom yet extant in the world. So that, if not directly yet derivatively, the original amendments of the Constitution are distinctly the contribution of Virginia.

Thus supplemented, the Federal Constitution af-

forded in potency and promise a sufficient safeguard to all the great interests it was designed to conserve — the supremacy of the central government, the rights of the States, and the inalienable liberties of the people.

It still remained, however, to discover and develop the principle by which these guarantees upon paper should be effectual to their purpose; for of what avail to assert Federal supremacy if it be impugned by the action of the States, or to reserve State rights if they be invaded by the national authority, or to declare inviolable the immunities of the citizen if they be infringed by the usurpation of government? Plainly a power, in some quarter, to restrict the several departments to their normal functions, and to arrest any aberration of the Federal or State government from its legitimate orbit, was indispensable to the harmonious and beneficent operation of the complicated system. Obviously, too, the only method by which this necessary result could be accomplished was by nullifying any act, Federal or State, which should contravene the provisions of the Constitution.

But to what organ of government might this portentous power be safely intrusted? Not to the Executive, already armed with more than regal energies. Not to the Legislature, which, obedient to popular interest and popular passion, would make the mandate of its constituency the measure of legal authority. By the nature of its functions the Judicial Department alone was competent to the

delicate and difficult task of expounding the sense of the Constitution, and adjudging what act, Federal or State, was beyond its limitations. Without purse or sword — depending upon the Legislature for the means of its subsistence, and upon the Executive for the enforcement of its decrees — its only power was moral; and so its faculty of invalidating an unconstitutional act is fraught with no menace to the institutions or the liberties of the country. Then, too, the sanctity which in the American mind hallows the judicial office, and the reverent submission with which the American people bow to the adjudications of private right,— and only in such adjudications can the validity of a law be determined,— this homage rendered to the judiciary was an all-sufficient guaranty that its judgment discrediting an unauthorized act would be accepted as the imperative voice of the Constitution itself.

And yet, nowhere in the Constitution is there an explicit concession to the judiciary of power to invalidate an act, Federal or State, because repugnant to its provisions. Implicit authority so to adjudge was vehemently denied in the Convention, and in the year 1800 was challenged from the Supreme Bench by Justice Chase, the member most addicted to a latitudinarian construction of the Federal compact.

To-day, however, the jurisdiction of any court, the humblest no less than the most august, to pronounce an apparent law no law, because contrary to the Constitution, is a familiar and fundamental

principle of American jurisprudence. And it is the feature of our political system that is peculiarly the marvel and admiration of foreign jurists and statesmen. "There is no precedent for it," says Sir Henry Maine, "either in the ancient or the modern world." De Tocqueville declares that "the power vested in the American courts, of pronouncing a statute to be unconstitutional, forms one of the strongest barriers which has ever been devised against the tyranny of political assemblies." And Dr. Borgeaud writes, in 1894, that "a fundamental difference separates American constitution jurisprudence from that which has grown up in Europe. While in Europe the act by which the legislative power might violate an article of the Constitution can only give rise to political redress, in the United States the judicial power may decide upon the constitutionality of laws."

While recognizing the utility of the institution, Bryne and Stevens discredit its novelty, affecting to see in it nothing more than the principle upon which English courts invalidate a by-law of a civil corporation because *ultra vires,* and in its application only an evolution from the law of agency. But where is the analogy between a judicial interdict of municipal transgression and the nullifying by the courts of the act of an independent and co-ordinate department of government? An ordinance beyond the scope of the municipal charter is void, because outside that charter there is no municipality; a law of a sovereign State or of Congress approved by

the President is invalidated by judicial sentence, because incompatible with the fundamental compact of union. In England an act of Parliament is the supreme law, anything in Magna Charta or the Petition of Right to the contrary notwithstanding; and the validity of such act is subject to no test but the will of the Parliament. In the United States an act of Congress or of a Legislature, though authenticated by all the formalities of regular procedure, is still to be in harmony with the organic law of the government; and if upon judicial inquiry it be found repugnant to that law, no matter what its apparent authority, its nullity is a necessary consequence.

No, gentlemen, the function of the judiciary to annul an act of legislation for repugnancy to the Constitution is an American invention, and is due to the sagacity of the statesmen of Virginia.

After expatiating upon the wisdom and beneficence of the institution, publicists are eager in tracing its origin, with the result that Rhode Island is distinguished as the place, and the year 1786 as the epoch, of the great discovery in political science. No share in the achievement is accorded to Virginia by any commentator on the American Constitution — either by Story or Kent or Cooley. And yet, in November, 1782,— four years before the Rhode Island case of Trevett v. Weedon — your own Court of Appeals, in Commonwealth v. Caton, reported 4 *Call,* page 5 — by a solemn judicial deliverance asserted the power of the courts. These are

the words: "To declare any act of the Legislature to be unconstitutional and void"; and it is of moment to remark that the doctrine was then vindicated by the argument upon which to this day it reposes.

Of no less significance are the facts that Chancellor Wythe, by whom the power of the judiciary to cancel an unconstitutional enactment was first officially promulgated, had for pupil John Marshall; that in 1788 John Marshall repeated his master's lesson on the floor of the State Convention, and that in 1803, as Chief Justice of the United States, the same John Marshall, sometime law student with George Wythe, delivered that judgment in Marbury v. Madison by which the principle he had learned under the tuition of Virginia was consolidated in the jurisprudence of the Union.

In the face of the authentic records of history, no candid critic will dispute the initiative of Virginia in the development of the most original and the most salutary principle in the American system of constitutional government.

But otherwise than in framing the Constitution of 1787, and in afterward calling into operation the principle upon which its success was suspended, the influence of Virginia was manifest in the formation of the Constitution. From the inevitable generality of its expressions, and its reserve in enumerating but not defining the powers communicated, it was open to a diversity of construction; and upon this alternative of interpretation depended its ef-

ficiency as an instrument of government. In the contemplation of a commentator inimical to its essential object, or incapable of penetrating beneath the surface of its text, it imparted authority of scarcely greater scope and vigor than was grudged to the defunct confederation. In the contemplation of a commentator sympathetic with its aims and competent to perceive the profound implications latent in its brief but pregnant phraseology, it was instinct with the energies of a self-sustaining and all-sufficient system. Of symmetrical form and heroic proportions, our organic law awaited the illumination of Marshall's mind, to draw from it the accents of transcendent power. He found the Constitution inanimate and inarticulate; he gave it life and light and a voice of sovereign command. Curtailed of his auxiliary expositions, the document itself were a futile engine of Federal action and a fragile bond of Federal union. Hence, the not over-strained statement in the *American Commonwealth,* that the Constitution is "the work of the judges, and most of all of one man, the great Chief-Justice Marshall." John Marshall, we remember, was a son of Virginia; and by him she developed the Constitution into the full majesty of its might.

Upon a retrospect of the circumstances and conditions out of which the Constitution of 1787 was evolved, and upon an impartial estimate of the agencies operative in its formation, the conclusion is obvious and incontrovertible that the authorship of that renowned instrument is justly ascribed to Vir-

ginia. It is founded upon institutions which she created; it is the emanation of influences which she set in action — she summoned the convention to frame it; it was her ideal and inspiration; in form and substance it was her conception — her plastic hand fashioned its distinguishing features; she gave it the vigor that has sustained and impelled the Union along an unexampled career of grandeur and glory.

The organic structure of government of which Virginia thus supplied the precedent, and the coincidence of Federal supremacy with State autonomy which she first realized, are not only prevalent already on the American continent, but are destined at no remote period to subdue the civilized world to their liberal and enlightened sway. Whatever fortune, therefore, may betide Virginia in the future posterity will perpetuate the remembrance of her great achievement; and so long as *imperium et libertas* shall subsist as the ideal of government, the Federal Constitution of 1787 will remain her imperishable monument.

Mr. President and Gentlemen, if I revert to an early epoch for illustration of Virginia's worth, it is not because her after annals are wanting in great names and great deeds. Down to 1860 her sons were ascendant on the national theater, and her counsels controlled the policy of government. They were Virginians who augmented the power of the Union by the acquisition of Louisiana and the Floridas; and the valor of Virginians extended its

empire to the Pacific Ocean. He was a Virginian who, by establishing the independence of Texas, introduced the "Lone Star" into the constellation of States. He was a Virginian who issued the interdict against European conquest in America, and so consecrated the continent as the abode of democratic institutions. He was a Virginian whose strong arm upheld the Southern Confederacy against the pressure of opposing millions, and whose martial exploits invest the "Lost Cause" with a halo of unfading luster "*si Pergama dextra defendi potuit, etiam hac defensa fuisset.*"

From her firstborn to her latest,— from Washington to Lee, unequal only in fortune,— the Old Commonwealth has maintained the high strain of her noble lineage.

The Virginians are not degenerate. Prostrated by a great catastrophe and stunned for a time by the stroke, they will recover their unconquerable spirit; and, true to the traditions of their fathers, the genius that ruled the Republic in the days of its fairest fame may again direct its destinies.

The story of Virginia's renown abides with us, not as a solace in our decline, but as an incentive to emulation of her ancient virtues; that so we may transmit her glory to the succeeding generation without blemish and without abatement.

VIII

THE PEOPLE OF THE STATE OF NEW YORK VS. THE NORTH RIVER SUGAR REFINING COMPANY

VIII

THE PEOPLE OF THE STATE OF NEW YORK VS. THE NORTH RIVER SUGAR REFINING COMPANY

The subjoined argument is of interest and importance, because: it was the first effort in any court of the country, by judicial decision, to break up a trust-combination; it was successful; and emphatically, because it established that the principles of the Common Law are adequate and effective to the destruction of such combination. For, at the time there was neither Federal nor State statute invalidating such combination.

Indeed, subsequent Federal and State statutes afford a protection to monopolies, since it is held that the statutes supersede the operation of the Common Law; and that if monopolies be not within statutory terms they are immune against attack — in analogy to the perpetual coypright of the Common Law, which the courts adjudged to be destroyed by the statute of Anne, limiting copyright to a definite period.

COURT OF APPEALS

The People of the State of New York,
Plaintiffs and Respondents,
against
The North River Sugar Refining Company,
Defendant and Appellant.

Argument of Roger A. Pryor for the Respondents: 1890.

STATEMENT

Appeal from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order affirming a judgment in favor of plaintiffs and an order denying a motion for a new trial.

Action under the Code of Civil Procedure which, Section 1798, provides that in a suit by the Attorney-General the charter of a domestic corporation may be vacated upon the ground that it has either:

First.—Offended against any provision of an act by or under which it was created, altered, or renewed, or an act amending the same and applicable to the corporation; or,

Second.—Violated any provision of law whereby it has forfeited its charter or become liable to be dissolved by the abuse of its powers; or,

Third.—Forfeited its privileges or franchises by a failure to exercise its powers; or,

Fourth.—Done or omitted any act which amounts to a surrender of its corporate rights, privileges and franchises; or,

Fifth.—Exercised a privilege or franchise not conferred upon it by law.

Trial by jury in conformity with the requirement of Section 1800. Judgment of dissolution in compliance with the provisions of Section 1801.

Defendant offered no evidence, but upon the assumption of the insufficiency of the plaintiff's case,

moved the Court to direct a verdict in its favor (fol. 244), and omitted to request the submission of any question to the jury. On motion of plaintiffs the Court directed a verdict for them (fol. 244).

POINTS

A

The judgment is vitiated by no technical error.

1.—Appellant is estopped to say that the case should have gone to the jury; and if there be any evidence to sustain the decision, it will be upheld on appeal. (Dillon *vs.* Cockroft, 90 N. Y., 649; Provost *vs.* McEnroe, 102 N. Y., 650; Ormes *vs.* Dauchy, 82 N. Y., 443; Trustees *vs.* Kirk, 68 N. Y., 459, 464; Stratford *vs.* Jones, 97 N. Y., 589.)

An uncontroverted state of facts presents a question of law which the Court not only may, but must, determine by a peremptory instruction to the jury. (Appleby *vs.* Ins. Co., 54 N. Y., 260; People *vs.* Cooke, 8 N. Y., 67; Lomer *vs.* Meeker, 25 N. Y., 361; Dwight *vs.* Ins. Company, 103 N. Y.; 341, 359; Kelly *vs.* Burroughs, 102 N. Y., 93; Stratford *vs.* Jones, 92 N. Y., 589; Leggette *vs.* Hyde, 58 N. Y., 275.)

The rule prevails in *quo warranto* to forfeit a corporate franchise. (People *vs.* Waterford, &c., 2 Keyes, 329.)

If the proof of a fact be so preponderating that a verdict against it would be set aside, the Court must direct a verdict in accordance with the evidence. (Dwight *vs.* Germania Ins. Co., 103 N. Y., 358.)

The verdict of the jury, although under the direction of the Court, was a general verdict for the People; and, being a general verdict, it settles in favor of the prevailing party every fact litigated upon the trial. (Wolf *vs.* Life Ins. Co., 43 Barb., 405; affirmed 41 N. Y., 620; Murphy *vs.* Lippe, 35 Super. Ct., 542; Nichols *vs.* Martin, 35 Hun, 168, 173; Koehler *vs.* Adler, 78 N. Y., 287.)

"In the disposition of the case by this Court the facts most favorable to the plaintiff must be deemed to have been found in his favor." (Cady *vs.* Bradshaw, 116 N. Y., 190.)

2.—The solitary exception to evidence (fol. 1658) is plainly untenable. (Kelly *vs.* Doody, 116 N. Y., 583; Sweet *vs.* Tuttle, 14 N. Y., 465, 472; DeCamp *vs.* McIntire, 115 N. Y., 259, 266; Nicolay *vs.* Unger, 80 N. Y., 54, 57; DeWolf *vs.* Williams, 69 N. Y., 621, 662; Nichols *vs.* White, 41 Hun 155; Knapp *vs.* Smith, 27 N. Y., 281.)

The evidence was competent to prove an essential fact in the case, namely, that defendant's stock was held by the board for the purposes declared in the Sugar Refineries Company deed. For what purpose the stock was held — whether for the interest of the combination or for another and different object — is plainly a question of fact, and a question not soluble by construction of the deed, but to be answered only by a witness cognizant of the purposes for which the stock was deposited with the board. Conceivably the stock might have been transferred for an object altogether foreign to the

purposes of the combination; and, if so, then it would not have been held under the provisions of the deed. Parole evidence to connect an instrument with its subject and object is always competent when necessary. If here the evidence were not necessary, *i. e.*, if the deed exhibited the connection with the stock, then the evidence is harmless.

B

On the merits the validity of the judgment is unimpeachable — the unchallenged evidence exhibiting a clear case for the forfeiture of defendant's charter.

1

The creation of a corporation is an act of sovereignty (Wood's Field on Corporations, Sec. 6), and the consideration of the grant of corporate franchises is the public benefit.

"The objects for which a corporation is created are universally such as the Government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration and in most cases, the sole consideration of the grant." (Marshall, C. J., in Trustees of Dartmouth College *vs.* Woodward, 4 Wheaton, 518, 637; The Binghamton Bridge, 3 Wall., 51, 73; 2 Waterman on Corp., Sec. 431.)

"In the granting of charters the Legislature is presumed to have had in view the public interest, and public policy is concerned in the restriction of

corporations within chartered limits, and a departure therefrom is only deemed excusable when it cannot result in prejudice to the public." (Gray, J., in Leslie vs. Lorillard, 110 N. Y., 531.)

"Grants of franchises are the conferring on individuals rights belonging to the whole people, and can only be justified by securing to the people, in the grants themselves, benefits equivalent to the rights which the grants take from them. This can only be done by enforcing a strict performance of all the beneficial conditions of such grants." (Bradish, Pres., in Thompson *vs.* People, 23 Wend., 559.)

"The charters and franchises of modern times are contracts made for public consideration and advantage." (*Id.,* 580, Senator Verplanck.)

II

Hence, corporate franchises are granted in trust, and upon condition; in *trust,* on the one hand, that they be exerted to the attainment of the object for which they are conceded, and on the other that they be not abused to the public detriment; upon the *condition* that for *nonuser* or *misuser* they may be reclaimed by the State in the appropriate judicial proceeding.

"Franchises may be forfeited by a breach of the trust on which they were granted, and perversion of the end of the grant or institution. The performance of the duties enjoined by the charter is a condition of the grant." (Rapallo, J., in People *vs.* W. T. & B. Co., 47 N. Y., 586, 592.)

"A corporation may be dissolved, for it is created upon a trust, and if that be broken it is forfeited." (Sir James Smith's Case, 4 Modern, 58.)

"Franchises, being regal privileges in the hands of the subject, are held to be granted upon the condition of making a proper use of them; and may be lost or forfeited either by abuse or neglect." (2 Black. Comm., 153.; Earl of Shrewsbury's Case, 9 Rep., 46.)

"All corporate franchises are granted upon condition that they should be duly executed according to the charter that settles the constitution." (Lord Holt in City of London *vs.* Vanacker, 1 Lord Raymond, 499.)

"The primary object of the institution of a corporation is the public welfare, and the interest of the stockholders is but secondary; hence the willful frustration of that intention is a fraud on the public"— affirming of a corporation whose stock had been absorbed by a rival corporation to prevent competition. (Appeal of the Electric Light, &c., Co.; 122 Pa. St., 154; 9 Am. St. R., 81.)

"A corporation is made a body politic on the implied condition that it should demean itself faithfully and honestly in the use of all its franchises." (People *vs.* Bristol, &c., 23 Wend., 235-6.)

"The performance of the duties enjoined by the fundamental law by or under which it is created is in all cases a condition of the grant of corporate privileges; and a failure, therefore, to perform any of these duties is a breach of the condition upon

which the corporation holds its franchises." People *vs.* Fishkill, &c., 27 Barb., 445, 452.)

"That a corporation may be dissolved for a breach of trust is the settled doctrine at this day." (Kent, C., in Slee *vs.* Bloom, 5 Johns. Ch., 380.)

"A corporation must come up to the substantive objects for which it was instituted. If it depart from any of these, it is guilty of a breach of trust." (People *vs.* Bristol, &c., 23 Wend., 236.)

"Every private corporation undertakes and agrees, upon condition of forfeiture, that it will exercise the rights and privileges conferred upon it in furtherance of the objects and purposes of its creation, and not otherwise; and that it will so manage and conduct its affairs that it shall not become dangerous or hazardous to the safety or well being of the State or community in and with which it transacts business." (Ward *vs.* Farwell, 97 Ill., 593.)

"The corporate franchise is granted upon condition that it shall become void in case of misuser." (People *vs.* Phoenix Bank, 24 Wend., 433.)

"Corporate rights and powers are the correlatives of corporate obligations and duties; constitute the consideration for the corporate franchises; and their performance may be exacted as a condition of corporate existence." (Mayor *vs.* R. R. Co., 113 N. Y., 311, 319.)

"Franchises may be forfeited by breach of the trust on which they are granted, and perversion of the objects of the grant." (People *vs.* Dispensary, 7 Lans., 306.)

"The grant of corporate franchises is necessarily subject to the condition that the privileges and franchises conferred shall not be abused, and that when abused or misemployed they may be withdrawn by proceedings consistent with law." (Ins. Co. *vs.* Needles, 113 U. S., 574.)

"A private corporation created by the Legislature may lose its franchises by a misuser or nonuser of them; and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. This is the common law of the land, and it is a condition annexed to the creation of every such corporation." (Terrett *vs.* Taylor, 9 Cranch., 52; 2 Kent Com., 312; Slee *vs.* Bloom, 5 Johns. Ch., 366, 379; Com. *vs.* Bank, 21 Picker, 542; A. and A. on Corp., Sec. 774 (9th ed.); Ins. Co. *vs.* Needles, 113 U. S. 574.)

"The grant to a corporation being made upon an implied pledge that the condition of it shall be fulfilled, when the public is affected by a breach of the condition, it is a violation by the corporation of its duty. The State is not required to prove an actual injury; it is a sufficient cause of forfeiture if the act be such as in the nature of things is calculated to produce injury." (2 Waterman on Corp., Sec. 427.)

"The public have an interest that a corporation shall not transcend the powers granted." (R. R. Co. *vs.* Keokuk Co., 113 U. S., 384.)

III

Any act of a corporation, in violation of law and to the public detriment, forfeits its franchises.

"It is a sufficient cause of forfeiture, if the acts complained of are illegal either under the statute or at common law, or in violation of the inherent and fundamental principles or implied conditions of its existence." (State *vs.* R. R. Company, 45 Wisc., 590; Ches. & Ohio, &c., *vs.* Balt. & Ohio, &c., 4 Gill and Johns., 121.)

The existence of a corporation may be annulled when it has "violated any provision of law whereby it has forfeited its charter or become liable to be dissolved by the abuse of its powers." (Code Civ. Pro., Sec. 1798, Sub 2.)

"The statute provides that an information may be filed to procure the forfeiture of the charter and privileges of a corporate body for a violation of any provision of law in such way as to constitute a positive misuser." (People *vs.* Fishkill, &c., 27 Barb., 452.)

"The misuser must be such a neglect or disregard of the trust, *or such a perversion* of it, as in some manner or in some degree to lessen its utility to those for whose benefit it was instituted" (*i.e.*, the people), "or else to work some other public injury." (Thompson *vs.* People, 23 Wend., 581-2, Verplanck, Senator.)

"Some misdemeanor in the trust, injurious to the public," is a sufficient ground of forfeiture. (Ich., 583-4.)

IV

Acts and contracts *ultra vires* the corporate authority are illegal; and where prejudicial to the public interests are grounds of forfeiture of the corporate franchise.

1.—" The act of incorporation is to them an enabling act; it gives them all the power they possess; and when it prescribes to them a mode of contracting, they must observe that mode." (Marshall, C. J., in Head *vs.* The Providence Co., 2 Cranch., 169.)

In grants by the public, nothing passes by implication. (U. S. *vs.* Arrendondo, 6 Peters, 736.)

" The language employed (in the act of charter) defines their power and duties, and excludes by necessary implication . . . the adoption of any other method for the promotion of such business than those specially pointed out by the statute." (Ruger, C. J., in Nassau Bank *vs.* Jones, 95 N. Y. 121.)

" The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare." (Fertilizing Co. *vs.* Hyde Park, 97 U. S., 666.)

"The charter of a corporation is the measure of its powers, and the enumeration of these powers implies the exclusion of all others." (Thomas *vs.* R. R. Co., 101 U. S., 82; Green Bay, &c., *vs.* Company, 107 U. S., 98; Pratt *vs.* Short, 79 N. Y., 437.)

This elementary common law principle, that a corporation can exercise no power not expressly granted, or necessarily implied, is made a positive prohibition of statute, which prescribes that "no corporation shall possess or exercise any corporate powers, except such as are given or enumerated, or are necessary to the exercise of the powers so given or enumerated." (First Part Rev. Stats., Title III; Ch. 18, Sec. 3; Laws 1861, Ch. 170; Milbank *vs.* R. R. Co., 64 How., 24.)

Hence, an act *ultra vires* is an infraction of positive law.

And this statute declares the public policy of the State (Morris, &c., *vs.* R.R. Co., 20 N. J. Eq., 542); and makes an unauthorized corporate act illegal. (Ashbury, &c., *vs.* Riche, L. R., 7 H. of L., 653.)

2.—"Judgment of ouster and dissolution has always been the punishment for the wanton violation of a charter; and it may be made to follow whenever the proper public authority shall see fit to invoke its application." (Nat. Bank vs. Matthews, 98 U. S., 621, 629.; Bank *vs.* Whitney, 103 U. S., 102.)

"If the utility of the corporation be lessened, or if any injury result to the public, by an act which it is not authorized to do, it is a forfeiture." (Bank *vs.* State, 6 Smedes and M., 599, 623.)

"When a corporation does acts which it is not authorized or is forbidden to do, the State may forfeit its franchises and dissolve the corporation." (Taylor on Corp., Sec. 457, 289, 459; People *vs.* Utica, 15 Johns., 358.)

For, "The public has an interest in the proper administration of the powers conferred by the act on the corporation." (East Anglia, &c., *vs.* R. R. Co., 11 C. B., 775.)

"A corporation may incur a forfeiture of its franchises by the doing of an illegal act. Any act of a corporation which is forbidden by its charter, or by a general rule of law, and strictly every act which the charter does not expressly or impliedly authorize, is unlawful; and if the doing of such act is an injury to the public, it may be sufficient ground of forfeiture." (2 Morawetz on Corp., Sec. 1024.)

An act *ultra vires* is the usurpation of a franchise, and cause of forfeiture. (People *vs.* Trustees, 5 Wend., 211.)

"A contract with a corporation may be binding on the parties, though it was an abuse of the corporate powers for which the corporation is answerable to the government which created it." (Bank *vs.* Hammond, 1 Rich. (S. C.), 288; Southern *vs.* Lanier, 5 Fla., 100; Silver Lake *vs.* North, 5 John. Ch., 373.)

"The contracts of corporations which are not authorized by their charters, are illegal, because they are made in contravention of public policy." (Selden, J., in Bissell *vs.* R. R., 22 N. Y., 285.)

Where corporations abuse their powers, *e. g.,* by acts *ultra vires,* "the State may interpose and reclaim their charters." (*Id.,* 259.)

"A contract made by a corporation in violation of the terms of its charter is *ultra vires,* and void as against public policy." (President, &c., *vs.* R. R. Co., 7 Lans., 241.)

An act *ultra vires* is an abuse of the corporate franchise. (Thomas *vs.* City, 12 Wallace, 356; Green's Brice, 708-9 — 2d ed.).

"The word 'unlawful' as applicable to corporations, is not used exclusively in the sense of *malum in se* or *malum prohibitum.* It is also used to designate powers which companies are not authorized to exercise, or contracts which they are not authorized to make, or acts which they are not authorized to do — such acts, powers and contracts as are *ultra vires."* (People vs. Chicago Gas Trust Co., 22 Chicago Legal News, 108, 41 Albany Law Journal, 58.)

A corporation may be dissolved when it has "exercised a privilege or franchise not conferred upon it by law" (Code Civ. Pro., Sec. 1798. Sub. 5), or "offended against any provision of the act under which it was created" (Sub. 1), or when it "has violated any provision of law whereby it has become liable to be dissolved by abuse of its powers" (Sub. 2).

"Considering the authority which the Attorney-General has, by suit, to forfeit the franchises of corporations for misuse or abuse, and to regulate

and restrain them in the exercise of their corporate rights, little danger is to be apprehended from the overgrowth of their power, or their monopolistic tendencies." (Ruger, C. J., in People *vs.* O'Brien, 111 N. Y., 1.)

A common law ground of forfeiture is still available though not within the statute. (People *vs.* Bristol, 23 Wend., 222; State *vs.* R. R. Co., 45 Wisc., 589; People *vs.* Palmer, 109 N. Y., 110.)

V

The rule that an illegal or unauthorized act is sufficient ground of corporate forfeiture, is abundantly illustrated by adjudicated cases.

In the King *vs.* The Mayor and Commonalty of London, 8 Howell's St. Tr., 1078, "the Great Quo Warranto Case" (Life of Chief Justice Saunders by Lord Campbell), it was argued by Treby and Pollexfen for the defendant that the charter of a corporation was not liable to forfeiture for an act *ultra vires* or contrary to law; and that the unauthorized or illegal act was not predicable of the corporation — a mere *ens legis,* incapable of action — but of the individuals composing it; who alone were accountable to the law.

But the contention was discredited by the Court, and the principle established, that the act of its constituents is the act of the corporation, and that a corporation incurs the penalty of forfeiture by an act illegal or *ultra vires.*

However odious this decision in its political aspect, its validity as a legal proposition stands unchallenged to the present day. (Thompson *vs.* The People, 23 Wend., 572.)

So, when a bank chartered to do business in one county of the State established a branch in another county, it became forfeit. (People *vs.* Bank, Douglass (Mich.), 282.)

So, when a college chartered in one place establishes a medical school in another. (The People *vs.* Geneva College, 5 Wend., 211.)

So, extortionate charges by a railroad company. (Attorney-General *vs.* R. R. Co., 35 Wisc., 432, 532.)

So, a neglect by a bank to make a report required by law. (State *vs.* Bank, 5 Ohio St., 171.)

So, violating a restriction on the rate of interest upon loans. (Com. *vs.* Bank, 28 Penn. St., 383; State *vs.* Bank, 33 Miss., 474.)

So, keeping its principal place of business, officers and records in another State. (State *vs.* R. R. Co., 45 Wisc., 580.)

So, dividing with an agent who procured a legislative appropriation to the corporation. (People *vs.* Dispensary, 7 Lans., 304.)

So, embezzlement of funds on deposit with a bank. (Bank *vs.* State, 1 Blackf. (Ind.), 267.)

So, omission of a duty expressly imposed by law, *e. g.*, to make a report. (Attorney-General *vs.* R. R. Co., 6 Iredell (Law), 469.)

So, when an insurance company carries on bank-

ing operations. (People *vs.* Utica Ins. Co., 15 Johns., 358.)

So, the unauthorized lease by a railroad company of its road, rights and franchises. (State *vs.* A. & N. R. R. Co., 4 R. R. & Corporation Journal, 86; Penn. Co. *vs.* St. Louis, &c., R. R. Co., 118 U. S. 290.)

So, a railroad corporation forfeits its charter, on *quo warranto,* by ceasing to operate a part of its route. (People *vs.* The R. R. Co., 24 N. Y., 261.)

So, a corporation forfeits its franchise by holding property in violation of the restraints of its charter. (Matter of McGraw, 111 N. Y., 111.)

So, if a railroad company abandon a portion of the line it was incorporated to operate, it will be dissolved. (People *vs.* R. R. Co., 24 N. Y., 261.)

For further instances and illustrations of grounds of forfeiture, see 2 Kyd on Corp., 479 *et seq.;* A. and A. on Corp., Secs. 774-776; 2 Waterman on Corp., Sec. 427; Green's Brice, 787; People *vs.* Bristol, 23 Wend., 233-250; State *vs.* R. R. Co., 8 Am. St. R., 188-190, note by Freeman.

VI

Agreements tending to monopoly, *i. e.,* "any combination among merchants to raise the price of merchandise, to the detriment of the public" (Bouvier's Law Dict., "Monopoly") are illegal. (People *vs.* American Sugar Refining Company, 7 Railway and Corporation Law Journal, 83.; Richardson *vs.* Buhl, *Id.,* 89; People vs. Chicago Gas Trust, 41

Alb. L. J., 68; Anderson *vs.* Jett, 41 Alb. L. J., 103; Leonard vs. Poole, 114 N. Y., 371; Arnot *vs.* Coal Company, 68 N. Y., 559; Stanton *vs.* Allen, 5 Denio, 434; Clancy *vs.* Salt Company, 62 Barb., 395; Hooker *vs.* Vanderwater, 4 Denio, 349; Texas & P. Ry. Co. *vs.* Southern P. Ry. Co., 6 Southern Reporter 888, 891, La. Supreme Court, 1889.)

People *vs.* Fisher, 14 Wend., 9-19; Colles *vs.* Trow Company, 11 Hun, 397; Watson *vs.* The Companies, 52 How., 348; Coal Co. *vs.* Coal Co., 68 Penn. St., 182; Salt Co. vs. Guthrie, 35 Ohio St., 672; Croft *vs.* McConoughy, 79 Ill., 339; Santa Clara *vs.* Hayes, 76 Cal., 387; 9 Am. St. R., 211; Bank *vs.* King, 44 N. Y., 87; Case of Monopolies, 11 Coke, 84; Raymond vs. Leavitt, 46 Mich., 447; India Bag Co. *vs.* Koch, 14 La. Ann., 168; Ray *vs.* Mackin, 100 Ill., 246; People *vs.* Stephens, 71 N. Y., 545; Marsh *vs.* Russell, 66 N. Y., 288; Hartford, &c., *vs.* R. R. Co., 3 Robt. 411; Hilton *vs.* Eckersley, 6 Ell. & Bl., 47; Central, &c., *vs.* Collins, 40 Ga., 582; Hoffman *vs.* Brooks, 11 Weekly Law Bulletin, 258.

And, in all the cases adjudging monopoly agreements and combinations to be illegal, the ground of decision is, that they tend to the public prejudice, by preventing competition and enhancing prices.

"Monopolies are favorites neither with Courts nor people. They operate in restraint of competition, and hence are, as a rule, detrimental to the public welfare." (Electric Company, 9 Am. St. R., 82.)

"Free competition is the life of business; and all combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies and intolerable, and ought to receive the condemnation of all courts." (Richardson *vs.* Buhl, 7 Railway & Corp. Jour., 96.)

"Monopolies are destructive of individual right and public interests." (Metcalf *vs.* Brand, 9 Am. St. R., 289; 86 Ky., 331.)

"The natural law of supply and demand is the best law of trade." (State *vs.* Goodwill, 41 Alb. Law Journal, 53, West Virginia Supreme Court.)

"Rivalry is the life of trade. The thrift and welfare of the people depend upon it. Monopoly is opposed to it all along the line." (Anderson *vs.* Jett, 41 Alb. L. Jour., 104.)

"Monopolies are justly odious, as they operate not only injuriously to trade, but against the general prosperity of the country." (Charles River Bridge *vs.* Warren Bridge, 11 Peters, 567.)

"I hold it to be an incontrovertible proposition of both English and American public law, that all mere monopolies are odious and against common right. . . . Monopolies are the bane of our body politic at the present day. In the eager pursuit of gain they are sought in every direction. They exhibit themselves in corners in the stock market and produce market and in many other ways." (Bradley, J., in Butchers' Union *vs.* Cresent, 111 U. S., 766.)

"The statute against monopolies (1623) is the *magna charta* of British industry." (2 Kent, 271, Marginal Note c.)

"It is against the general policy of the law to destroy or interfere with free competition, or to permit such destruction or interference. An unauthorized monopoly, therefore, is against public policy as destroying or interfering with free competition." (Stewart *vs.* The Company, 17 Minn., 372.)

"A contract which tends to create and perpetuate a monopoly is against public policy." (Gas Co. *vs.* Gas Co., 2 Am. State Reports, 124.)

"In its very nature, a right to exclude competition is injurious to the public." (City *vs.* Gas Light Co., 70 Mo., 69.)

"Competition is the life of trade, and whatever destroys or even relaxes competition in trade is injurious if not fatal to it." (4 Denio, 353; 14 Wend., 19.)

"Public policy favors competition in trade, to the end that its commodities may be afforded to the consumer as cheaply as possible; and it is opposed to monopolies, which tend to enhance market prices to the injury of the general public." (Salt Co. *vs.* Guthrie, 35 Ohio St., 666.)

"There are three inseparable incidents to every monopoly: that the price of the commodity will be raised; that the commodity is not so good and merchantable as before; that it tends to the impoverishment of artificers and others"; and so a charter of

monopoly was held void, as against common right and the liberty of the subject. (The Case of Monopolies, 11 Coke, 84.)

"With results naturally flowing from the laws of supply and demand, the Courts have nothing to do; but when agreements are resorted to for the purpose of taking trade out of the realm of competition, the Courts cannot be successfully invoked, and their execution will be left to the volition of the parties thereto." (Santa Clara, &c., *vs.* Hayes, 76 Cal., 387, 9 Am. St. Rep., 211.)

In Richardson *vs.* Buhl, 7 Railway and Corp. Journal, 89, the Supreme Court of Michigan (1889) held of a corporation organized to absorb other match manufactories, "that such corporation is unlawful and against public policy, its object being to prevent competition, and to control the price of an article of necessity." In People *vs.* Chicago Gas Trust Company, 41 Albany Law Journal, 68, the Supreme Court of Illinois (1889) ruled the same point.

In the People *vs.* The American Sugar Refining Company, 7 Railway & Corp. Law Journal, 83, the Superior Court of the City of San Francisco (1890) held of this identical combination that it constitutes a monopoly and an unlawful business (p. 86), and that connection with it forfeited a corporate charter.

In Anderson *vs.* Jett, 41 Albany Law Journal, 103, the Kentucky Court of Appeals (1889) held of an agreement between owners of two rival steam-

boats, to divide the net profits of each in a certain proportion, each bearing its own expenses, neither to sell his boat without notice to the other, and the one selling out not to enter the trade for a year, that its object and effect was to prevent competition and a consequent reduction of charges, and so was void as against public policy.

In Leonard *vs.* Poole, 114 N. Y., 371, this Court (Second Division) held that a combination for the purpose of raising the price of lard was "an unlawful plot" (378), and an "indictable misdemeanor" (377), under section 168 of the Penal Code, because injurious to trade and commerce.

In Mill and Lumber Co. *vs.* Hayes, 76 Cal., 387; 9 Am. St. R., 211, the Supreme Court of California denounced as against public policy and void a contract "entered into for the purpose of limiting the supply of lumber and increasing the price thereof, and giving one of the contracting parties control of all lumber near a particular town in the year designated, and to control the supply of lumber for that year in the counties mentioned in the contract."

An agreement between shareholders not to sell their respective stock without the concurrent consent of all is void, because "in restraint of trade and against public policy." (Fisher *vs.* Bush, 35 Hun, 641.)

An agreement by several firms not to sell, except with the consent of the majority, is a combination to enhance price, and unlawful. (India Bag Co. *vs.* Koch, 14 La. Ann., 168.)

In Arnot *vs.* Coal Company, 68 N. Y., 558, the purpose of the arrangement was "to artificially enhance the price" of coal; and the Court held that "a combination to effect such a purpose is inimical to the interests of the public, and all contracts designed to effect such an end are contrary to public policy, and therefore illegal"; and that this principle "is too well-settled by adjudicated cases to be questioned at this day" (p. 565).

In Colles *vs.* The Trow Company, 11 Hun, 397, the Court held that an agreement by defendant company to expend its funds in stopping the competition of a rival, was *ultra vires* and void — saying, page 398, "the corporation was not created for the purpose of destroying competition and establishing a monopoly in any other way than such as might be incidental to the superiority of its manufactures and their excellence and cheapness."

In the People *vs.* Fisher, 14 Wend., 9, 19, the Court say that "competition is the life of trade," and that "combinations and confederacies to enhance the prices of any article of trade or commerce are injurious" to the public, and therefore illegal.

A grant of an exclusive right of way and privilege of laying and maintaining tubing for transporting oil through a tract of two thousand acres, *held* invalid as an unreasonable restraint of trade and contrary to public policy. (West Virginia *vs.* Company, 46 Am. Rep., 527.)

In Watson *vs.* The Companies, 52 How., 348, *held* that a combination between rival steamboat

companies, for their " joint or mutual benefit or account," whereby competition between them was prevented, created a monopoly and so was " contrary to public policy and injurious to the public."

In Stanton *vs.* Allen, 5 Denio, 434, 441, the Court say, that " the association being thus secured against internal defection and external encroachment, and the members having thrown their concerns in a common stock, to derive an income in proportion to the number of shares they held, and not according to their merit and activity in business, and safe against the reduction of compensation that would otherwise follow mean accommodations and want of skill and attention, the public interest must necessarily suffer grievous loss," and accordingly the combination was held to be illegal.

In Hooker *vs.* Vanderwater, 4 Denio, 349, 353, *held* that " the object of this combination is to destroy competition " between the parties to it; that " competition is the life of trade," that " whatever destroys or even reduces competition in trade is injurious if not fatal to it," and that so the combination was a criminal conspiracy under the Statute, because injurious to trade and commerce. (People *vs.* Fisher, 14 Wend., 9.)

In Hoffman *vs.* Brooks, 11 Weekly Law Bulletin, 258, 259, the Court, speaking of agreements to prevent competition, say:

" The presumption is always against the validity of such agreements, and certainly where they in-

clude all those engaged in any business in a large city, or district, are unlimited in duration, and are manifestly intended, by the surrender of individual discretion, by the arbitrary fixing of prices, or by any of the methods in which the hope of gain makes human ingenuity so fruitful, to strangle competition outright and breed monopolies, the law, while it may not punish, will not enforce them. . . . . It is not averred that the prices fixed are extortionate, but it is enough that they are absolutely removed beyond the operation of every natural cause of fluctuation."

In Croft vs. McConoughy, 79 Ill., 346, 350, the Court, speaking of a combination to control the price of grain, says:

"So long as competition was free, the interest of the public was safe. The laws of trade, in connection with the rigor of competition, was all the guaranty the public required; but the secret combination created by the contract destroyed all competition, and created a monopoly against which the public interest had no protection."

"No one can claim protection for the exclusive use of a trade-mark which would practically give him a monopoly, &c. *If he would, the public would be injured, for competition would be destroyed.*" (Canal Co. *vs.* Clark, 13 Wall., 323.)

In People *vs.* Stephens, 71 N. Y., 545, the Court says that:

"Arrangements and combinations among those prepared and expecting to become bidders at auc-

tion to prevent competition are condemned as immoral and against public policy."

In Marsh *vs.* Russell, 66 N. Y., 292, the association apparently was a mere partnership; but the Court said that:

"If, however, the primary object of the firm was to prevent competition, it might be considered as against public policy, and that it would be 'condemned by proof that it was part of a conspiracy to control prices or create a monopoly.'"

In Hartford, &c., R. R. Co. *vs.* N. Y. & N. H. R. R. Co., 3 Robt., 415, the Court condemned as illegal an agreement by a railroad company not to extend its line, saying that:

"The agreement was intended to prevent any competition in travel; and such competition it was not lawful for the parties to prevent, or attempt to prevent." (Stewart *vs.* Erie Co., 17 Minn., 372; Charlton *vs.* Ry. Co., 5 Jurist, N. S., 1096.)

In People *vs.* Marx, 99 N. Y., 377, the Court declared a formal statute unconstitutional and void, because it "prohibited an important branch of industry for the sole reason that it competed with another and might reduce the price of an article of food for the human race." (387.)

In Alger *vs.* Thacher, 19 Pick., 51, Morton, J., enumerates these among the grounds that invalidate contracts in restraint of trade: "4. They prevent competition and enhance prices. 5. They expose the public to all evils of monopoly. And this is especially applicable to wealthy companies and

large corporations, who have the means, unless restrained by law, to exclude rivalry, monopolize business and engross the market." (Bishop *vs.* Palmer, 146 Mass., 469; Oregon *vs.* Winsor, 20 Wall., 64, 67.)

"No one can claim protection for the exclusive use of a trade-mark which would practically give him a monopoly in the sale of any goods other than those produced by himself. If he could the public would be injured rather than protected; for competition would be destroyed." (Goodyear Co. *vs.* Goodyear Co., 39 Alb. Law Journal 95 (U. S. S. Ct.).

An agreement to prevent competition at a public sale is void, as against public policy. (Brisbane *vs.* Adams, 3 N. Y., 129.)

A combination to advance the price of stocks by means of fictitious dealings is void, as against public policy. (Livermore *vs.* Poor, 5 Hun, 285.)

An agreement not to run a competing line of steamboats is illegal and invalid. (Wright *vs.* Rider, 36 Cal., 342.)

"It is *ultra vires* and illegal for one railroad company to purchase the stock of another with a view to obtain a controlling interest in the latter, and then prevent competition between itself and the other company." (Central R. R. *vs.* Collins, 40 Ga., 582; Hazelhurst *vs.* Savannah, &c., R. R. Co., 43 Ga., 13; Elkins *vs.* Atlantic, &c., R. R. Co., 36 N. J. Eq., 5.

"Property bought of an opposition steamship

line, not with a view to employing it in connection with the business of the road, but to withdraw it from business, thereby preventing competition, is not authorized by the charter." (Morgan *vs.* Donovan, 58 Ala., 242.)

An agreement by one steamship company to pay another so much a month, as long as the former is suffered to run without opposition, is immoral and in restraint of trade. (Murray *vs.* Vanderbilt, 39 Barb., 141.)

Land may not be acquired by a railroad company to prevent interference by competing lines. (R. R. Co. *vs.* Davis, 43 N. Y., 137, 146; Pierce on Railroads, 513, note 2.)

"It is not competent for a railroad company to grant to a single telegraph company the exclusive right of establishing lines of telegraph communication along its right of way. The purpose of such contracts is very plainly to cripple and prevent competition, and they are therefore void, as being in restraint of trade and contrary to public policy." (Western Union vs. R. R. Co., 11 Federal Reporter, 3; Western Union *vs.* Company, 23 Federal Reporter, 12; Balt., &c., Co. vs. Company, 24 Federal Reporter, 319; Western Union *vs.* Company, 65 Ga., 160; Western Union *vs.* Company, 29 Am. Rep., 31.)

Combinations of railroads to monopolize freight and carriage are illegal. (Denver *vs.* Company, 15 Fed. Rep., 650.)

A municipal by-law in restraint of trade is il-

legal and void. (Hunt *vs.* Wickwir, 10 Wend., 102.)

An agreement by lessee with lessor that his employes shall trade only with the lessor is unlawful, as tending to monopoly. (Crawford *vs.* Wick, 18 Ohio St., 190.)

Combinations to "corner" commodities are illegal. (Sampson *vs.* Shaw, 101 Mass., 145; Leonard *vs.* Poole, 114 N. Y., 371.)

"It may be useful and lawful to restrain him from trading in some places, unless he intends a monopoly, which is a crime." (Parker, J., in Mitchell *vs.* Reynolds, 1 P. Williams, 181.)

"If a contract go to the total restraint of trade in the State where it is made it is necessarily void." West Virginia *vs.* Company, 46 Am. Rep., 529; Dunlap *vs.* Gregory, 10 N. Y., 244; Lawrence *vs.* Kidder, 10 Barb., 642.)

The authority of the Mogul Steamship Co. *vs.* McGregor *et al.* is weakened by the considerations: *first,* that the decision was not by a Court of last resort, where it may be reversed; *second,* the decision was by a divided Court; *third,* the decision turned upon the principles of the common law, whereas here a statute denounces combinations injurious to trade and commerce; *fourth,* the decision is contrary to the uniform current of adjudication in this and other States of the Union. See criticism of the decision by Sir Frederick Pollock, 7 Railway & Corp. Law Journal, 61; and letter from the British Consul at Hankow on the disastrous effect of

the decision upon trade, 6 R. R. & Corp. Law Journal 159.

In Chappel *vs.* Brockway, 21 Wend., 163, the agreement "only secured the plaintiff in the exclusive enjoyment of his business as against a single individual, while all the world beside were left at full liberty to enter upon the enterprise."

In Leslie *vs.* Lorillard, 110 N. Y., 519, there was no element of combination, and the *dictum* was only that contracts are not void, as being in general restraint of trade, when they operate simply "to prevent *a* party from engaging or competing in the same business." But on page 533 the Court says: "Corporations are great engines for the promotion of the public convenience and for the development of public wealth; and, so long as they are conducted for the purposes for which organized, they are a public benefit, *but if allowed to engage, without supervision, in subjects of enterprise foreign to their charters, or if permitted unrestrainedly to control and monopolize the avenues to that industry in which they are engaged, they become a public menace, against which public policy and statutes design protection.*"

In the Diamond Match Company *vs.* Rober, 106 N. Y., 473, the *decision* was that the agreement, being only in partial restraint of trade, was valid on common law principles; but on page 483 the Court says, "Combinations between producers to limit production and enhance prices are, or may be, unlawful, but they stand on a different footing."

The Statute Book of the State is replete with Acts indicative that restriction of competition is contrary to its policy, *e. g.*: Laws 1884, Ch. 252, Sec. 15; 111 N. Y., 65; Laws 1841, Ch. 183, Sec. 16; Laws 1854, Ch. 232; 2 R. S. (1st ed.), 691, Sec. 8; 7 Edmunds' Stats., p. 532, Sec. 9.

The monopoly of a copy and patent right indicates no government policy hostile to competition, but is an exceptional measure for the stimulation of genius in authorship and invention, by guaranteeing it for a period the exclusive benefit of its production. Not private aggrandizement, but the public interest is the distinct object of the regulation. (2 Mill Pol. Econ., 548.)

But, in truth, this tedious citation of doctrine and decisions to exhibit the illegality of monopoly combinations is unnecessary, since, for the support of the judgment, we are content to stand upon the law as propounded by the learned counsel for defendant in their argument below.

On page 5-6 of his brief Judge Daly concedes that the effect of the adjudications is:

"That combinations are unlawful, the design and effect of which necessarily is to give the party combining a monopoly *more or less, for any length of time,* of the manufacture or sale of a commodity, or of rates for transportation, or to regulate and control the price of commodity, or to control the rates for the transportation of persons or merchandise, or to secure any pecuniary or other advantage in restraint of trade, which would be injurious to the

community. The unlawful purpose in all these cases was either to raise prices or rates by means of the combination, or to keep them under its control so that the effect would be to compel the public to pay higher prices or rates than they would have to pay but for the combination."

And on page 5 the distinguished jurist explicitly admits that such a combination is an indictable offense.

VII

The combination created by "The Sugar Refineries Company" deed, being injurious to trade and commerce, is a criminal conspiracy, and an indictable offense.

1.—It was so at common law. (Raymond *vs.* Leavitt, 46 Mich., 447; Rex *vs.* DeBerenger, 3 M. and S., 67; Rex *vs.* Hillber, 2 Chitty, 163; Rex *vs.* Waddington, 1 East., 143, 167; Rex *vs.* Sterling, 1 Keble, 650; The King *vs.* Norris, 2 Kenyon, 300; Anonymous, 12 Modern, 248; People *vs.* Melvin, 2 Wheeler's Cr. Cas., 262; Com. *vs.* Carlisle, Brightly (Pa.), 36; 4 Black. Com. 158-9; 2 Bish. Cr. Law, Sec. 231; 1 Russ. Cr. Law, 168; 3 Inst., C. 89.).

2.—It is so in the State of New York, by express provision of statute. (Penal Code, Sec. 168, Sub. 6; Leonard *vs.* Poole, 114 N. Y., 371; Pittsburg *vs.* McMillin, 53 Hun, 67, 69; People *vs.* Fisher, 14 Wend., 9; Morris Run Co. *vs.* Barclay, 68 Pa. St., 174; Hooker *vs.* Vanderwater, 4 Denio, 349; Clancy *vs.* Salt Co., 62 Barb., 395; Barbour's Cr. Law, 245.)

VIII

The character of the combination, whether tending to monopoly and injurious to the public, will be determined by the provisions of the instrument constituting it, without reference to its effects in actual operation.

"The clear tendency of such an agreement is to establish a monopoly and to destroy competition in trade. It is no answer to say that competition in the salt trade was not in fact destroyed, or that the price of the commodity was not unreasonably advanced. Courts will not stop to inquire as to the degree of injury inflicted upon the public; it is enough to know that the inevitable tendency of such contracts is injurious to the public." (Salt Co. *vs.* Guthrie, 35 Ohio St., 672.)

In Hilton *vs.* Eckersly, 6 Ellis & Bl., 47, 65, Lord Campbell, C. J., construing the monopoly agreement in question, said:

"I do not think that any averment is necessary as to what has been done under it, or as to any mischief which it has actually produced. We are to consider what may be done under it, and what mischief may thus arise."

In Clancy *vs.* Salt Company, 62 Barb, 406, the Court say:

"It is impossible for any man, in reading this agreement, not to see that the object of the parties to it was to limit the production of salt — to create a monopoly — and to increase the price of salt";

and upon the terms of the agreement the Court *held* it illegal on general principles of law.

In Atchison *vs.* Mallon, 43 N.Y., 149, per Folger, J.: " It is not necessary for the determination of this case to inquire whether the effect of the agreement between the parties was in fact detrimental. The true inquiry is, is it the natural tendency of such an agreement to injuriously influence the public interests? The rule is, that agreements, which, in their necessary operation, tend to restrain natural rivalry and competition, and thus result in disadvantage to the public, are against the principles of sound public policy, and void."

" One result is that the Chicago Gas Trust Company can control the other companies. The question is not whether it has attempted to exercise such control; the law looks to the general tendency of the power conferred." (People *vs.* Chicago Trust, *supra.;* Richardson *vs.* Crandall, 48 N. Y., 348.)

" Its object and direct tendency is to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree." (Richardson *vs.* Huhl, 7 Railway & Corp. Journal, 97.)

" The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is the combination or agreement.

the practical evil effect of the combination only demonstrates its character; but if its object is to prevent or impede free and fair competition in trade, and may in fact have that tendency, it is void, as being against public policy." (Anderson *vs.* Jett, 41 Alb. L. Journal, 104.)

Indeed, counsel for appellant concede that the case presents only a question of law upon the construction of the agreement: "Being a question of *science* and not a question upon evidence as to what the actual effect has been, it must be considered and taken to be a question of *law*." (Argument of Mr. Carter, p. 21.)

Nor will the Court be deceived by the plausible professions of purpose on the face of the paper, but will construe it upon its manifest tendency.

"The law is not to be hoodwinked by colorable pretenses." (Shaw, C. J., Com. *vs.* Hunt, 38 Am. Dec., 347-8; Hooker *vs.* Vanderwater, 4 Denio, 352; Stanton *vs.* Allen, 5 Denio, 440; Matter of Jacobs, 98 N. Y., 110; Mugler *vs.* Kansas, 123 U. S., 661; Fisher *vs.* Bush, 35 Hun, 643; Harrington *vs.* Victoria, &c., 28 Moak Eng. R., 453.)

IX

The question then is, whether, by its provisions, the trust agreement tends to the suppression of competition and the enhancement of prices. Counsel for appellant concede this to be the question for adjudication: "The question which you have to decide is, whether this agreement tends to stifle com-

petition and enhance prices, and therefore to work an injury to trade and commerce" (Mr. Carter, p. 22). And on p. 30 he says: "I deny that this agreement does tend to stifle competition or to enhance prices to the consumer."

On the contrary, respondents affirm, that the "Sugar Refineries Company" deed does constitute a combination tending to monopoly, the prevention of competition, and the enhancement of prices.

I.—To an accurate apprehension of the operation and effect of the instrument and the resulting combination, it is requisite to recur to a few of the laws of economic science.

1st. In determining the laws of value, political economy proceeds upon the postulate that competition is free. (Laughlin, Elements of Pol. Economy, Sec. 94.)

2d. The natural or normal price of a commodity is the cost of its production, including in such cost the profit of the producer.

And, toward this price the market price of the commodity constantly gravitates. If the market price sink below the normal price, production will decrease; for men will not continue to produce at a loss, and production will diminish until the normal price is restored.

If the market price be above the normal price, *i. e.*, the cost of production *plus* the legitimate profit of the producer, capital, ever vigilant and active in quest of profitable investment, will, unless artificially arrested, rush into the production of the

commodity, until the increased production restores the normal price.

Thus the market price of commodities perpetually tends to their normal price — and this price is the highest the producer can get, if competition be free. (1 Mill's Principles of Political Economy, 556; Laughlin, Sec. 109; Cyclopædia of Political Science, "Competition," by Charles Coquelin.)

3d. The influence which disturbs the market price of a commodity, either raising it above, or depressing it below, the normal price, is the relative supply of the commodity. If the supply be greater than the demand for the commodity, competition between sellers will reduce the price.

If the supply be less than the demand, competition between buyers will increase the price.

"The price of every article of commerce is inversely in proportion to the supply." (Chalmers on Political Economy; Say's Pol. Econ. b. ii., ch. i.)

The normal price prevails when the supply is exactly equivalent to the demand.

4th. It results, therefore, that the supply determines the price of a commodity; and that a control of the supply involves a control of its price.

5th. If, however, the supply of a commodity be in several hands, with diverse interests, competition between them will stimulate production and so diminish the price. This effect, therefore, can only be prevented by concentrating the supply within the grasp of a single control — in other words, by a monopoly of the supply.

6th. In its nature monopoly is incompatible with competition — necessarily excludes it. "Wherever competition *is not,* monopoly is." (2 Mill's Principles of Political Economy, 378.)

The proposition is absurd that a single producer competes with himself in the sale of his commodity. And equally impossible is competition among many producers whose capacity of production is under the control of a single will — among many producers reduced by combination, or unification, to a single producer, and all of whom profit by the profit and lose by the loss of each.

7th. Monopoly, therefore, by control of the supply and by exclusion of competition, is absolute master of the price of the commodity monopolized. And, under the irresistible impulse of self-interest, monopoly will exact the highest price which the consumer of the commodity will stand. "The price of monopoly is upon every occasion the highest that can be got." (Wealth of Nations, 64; 1 Mill, 546, 552.)

"To confer a monopoly upon a producer or dealer, or upon a set of producers or dealers not too numerous to combine, is to give them the power of levying any amount of taxation on the public, for their individual benefit, which will not make the public forego the use of the commodity." (2 Mill, 547.)

"A producer without competition may raise his product to what price he will, even to the extreme

limit of the consumer's ability." (Say, Pol. Ec., b. ii., ch. i.)

8th. But to the monopoly price of a commodity, which is a necessity of comfortable existence, there is no assignable limit, since, for such a commodity, the consumer will pay an exorbitant price — economizing by abstaining from less indispensable articles. (1 Mill, 560.)

9th. As price depends upon the relation of the supply to the demand, monopoly can increase the price of its commodity only by reducing the supply. (1 Mill, 552.)

10th. As it is the competition between sellers only which reduces price, and as monopoly excludes competition, a diminution in the cost of production of a monopoly article does not lessen its price. (1 Mill, 558.)

II.—Viewed in the light of these principles — axioms in the science of political economy — the agreement constitutes a strict and absolute monopoly.

Its object to concentrate the control of the production of refined sugar under the dominion of a single will, and that will stimulated by self-interest to push the price of the commodity to the highest possible point. The scheme adopted for the attainment of its object is at once simple and infallibly effectual.

1st. The refineries become corporate bodies; the entire capital stock of each company is transferred

to a board consisting of eleven members; the stock so transferred is held in "strict joint tenancy," so as upon the death or retirement of a member to devolve upon the survivors; the vote of the majority is equivalent to "the unanimous action of the board." Thus, as sole owner of the entire capital stock of all the companies, the board absolutely dominates and controls the action of each and every company (R.R. Co. *vs.* Com., 7 Atlantic R., 368). Necessarily every question of corporate policy solvable by shareholders is determined by this board, for they are the only shareholders. Necessarily every question of corporate policy and management solvable by the trustees of the corporation is determined ultimately by this board; for they elect and remove trustees, and no man can be a trustee unless they choose to qualify him by a transfer of the requisite stock, and no man can be a trustee longer than they desire, since, by law to be a trustee one must be a stockholder, and trustees stipulate on request to retransfer their stock to the board. Thus the board controls at will the production and supply of sugar by the confederated refineries.

Such, in effect, is the admission of appellant: "The Board as sole stockholder is to elect directors of all the corporations, and thus can control, *as stockholders control,* but not otherwise, the action of all the companies." (Mr. Carter, p. 17.)

Again on page 56: "Suppose the board pass resolutions . . . there is no sort of doubt that the corporate bodies will assent; because they *are one*

with them. Undoubtedly these corporations can agree upon the manner in which they will do business *and the circumstance that competition is destroyed* between them makes it reasonable and probable that those resolutions will be carried out by all the members. . . . A power exists (in the Board) to fix a price *eventually.*"

2d. In return for the surrender of its stock to the board each company receives trust certificates in some proportion to the estimated value of its properties; the profits of the companies are turned into the board, and then are distributed among the certificate holders — exactly the same dividend being allotted to each share. Thus, each company sharing the profits and losses of every other, an absolute unity and identity of interest is secured among them. The profit of one being the gain of all and the loss of one the loss of all, competition between them is absolutely excluded, as absolutely as between copartners.

And, so appellant explicitly concedes: "Competition is destroyed between them," *i. e.,* the companies (Mr. Carter, 56.)

"It is the necessary effect, and may be assumed to be one of the purposes," of the combination (pp. 28, 54, 18, 17).

3d. Having the power to dictate the price, as they control the supply of refined sugar, the board is stimulated by self-interest to extort the utmost price, for its members are all holders of trust certificates. Collectively they own the greater part,

and, to insure their entire devotion to the interests of the "combine," they are prohibited, under severe penalties, to trade in sugar on their own account.

4th. The agreement makes provision for taking into the "combine" every other refinery in the country (fols. 40, 119), indeed, the "combine" already controls the entire production of refined sugar in the State of New York, and largely the production in the United States (fols. 166, 225, 227).

Thus the agreement contemplates and makes provision for a monopoly of the supply of sugar within the United States.

And that such is its object is further demonstrated by the interdict upon members of the board "to buy or sell sugar or be interested, directly or indirectly, in the purchase or sale of sugars."

"The control of the four companies by the appellee — an outside and independent corporation — suppresses competition between them, and destroys their diversity of interest, and all motive for competition. There is thus built up a virtual monopoly." (People *vs.* Chicago Gas Trust Co., *supra.*)

5th. In order to an adequate estimate of the control of the combination over the price of sugar, and so to measure its capacity for mischief, we must bear in mind that an exorbitant impost virtually excludes foreign competition; and that thus there is no limit to the power of the combination to plunder the

public but the ability of the public to pay the tribute.

6th. Thus it is apparent upon the provisions of its constitution, that the scheme contemplates and is framed to compass two cardinal objects: *First,* the prevention of competition between the refineries in the combination; and this it accomplishes by consolidating their interests and creating between them a community of profits and losses, and by subjecting them to the control of one and the same management, whereby an identity of price in the purchase of the raw material and in the sale of the finished product, may be fixed for each and every refinery. *Second,* a monopoly of the production and supply of sugar throughout the country by the absorption of all other refineries; for which provision is made by the express terms of the deed and by the reservation of an adequate fund in the treasury of the combination. To attain these objects is the obvious and only *raison d'être* of the combination; and in so far as it fails to realize either result, it miscarries in its mission. That either object suffices to condemn the combination as illegal — as, indeed, a criminal conspiracy against the public interests — is an incontrovertible proposition. Authorities, *supra.*

X

Conceding that the board " will be governed by the ordinary motives which influence human action, and, so far as it is for their interest and so far as

they have the power, to raise prices, to that extent undoubtedly it may be assumed that prices will be raised" (Mr. Carter, p. 17), and admitting that it is the aim and effect of the combination to prevent competition between its members, appellant argues that still the combination is ineffectual to maintain prices above their normal rate, because it is impossible for the combination to monopolize the production of refined sugar; and by an inexorable law of economic science, excessive profits will stimulate competition and so reduce prices to their normal level.

I.—Pausing upon the concession "that by the combination, competition among its members is destroyed," this effect of itself and alone condemns the combination as illegal; for it is precisely such combinations, and because of precisely such an effect, that are discredited and denounced in the adjudged cases (authorities, *supra*). The language of Courts and writers is uniform, that if the agreement or combination *tend* to monopoly, if it *reduce* or *lessen* competition, it is contrary to public policy and unlawful, because operating *pro tanto* an artificial enhancement of price. In no case or book is there an intimation even, that in order to incur the censure of the law, the combination must constitute a complete monopoly, and the agreement effect a total extinction of competition.

1st. The etymological is neither the scientific nor legal sense of *monopoly,* but both political economists and judges recognize and reprobate *partial*

and *temporary* monopolies, operating respectively partial and temporary detriment to the public interest. Monopoly comprehends "cases in which a person or a union of persons cannot control more than a portion of the whole supply of the commodity, since such a partial control may render possible and profitable an artificial rise in the price of the commodity" (Sidgwick, Prin. Pol. Econ., 338, 188-9, 408-9, 335, 336, 195). In a note (p. 189) this author adduces as an instance of a partial and temporary monopoly, and its ruinous consequences, the Gold Ring (Black Friday) of 1869. So, Mill, Vol. 1, p. 502: "A trade may also from the nature of the case" (*e. g.,* Sugar Refining) "be confined to so few hands that profits may admit of being put up by a combination among the dealers." Again on page 501: "If a business can be advantageously carried on only by a large capital" (*e. g.,* Sugar Refining), "this, in most countries so narrowly limits the class of persons who can enter the employment, that they are enabled to keep up their rate of profit above the general level." Again: "There are but few commodities which are naturally and necessarily limited in supply. But any commodity whatever may be artificially so. . . . Any commodity may be the subject of a monopoly" (1 Mill's Principles of Political Economy, 552, D. Appleton & Co., 1864).

And Laughlin (Elements of Pol. Econ., Sec. 203) says: "Other instances" (of partial monopoly) "are to be found in the temporary effects of

combinations and corners," by which "the supply is limited in order to cause the whole to be taken off at a price independent of the normal value."

If the bare possibility of a rival springing up to compete with the combination suffices to efface its character as a monopoly, then there can be no monopoly except in the rare and unimportant case of a complete possession or control of the commodity; and as to all the great trades and industries there can be no monopoly, and they are beyond the protection of the law which prohibits combinations to prevent competition and enhance price — a manifest *reductio ad absurdum.*

In none of the cases condemned by the courts as monopolies, we repeat, was there a complete and entire control of the commodity by the combination.

2d. Nor is a partial monopoly, *i. e.,* a combination controlling only a portion of the supply, ineffectual for the maintenance of monopoly prices (citations *supra* from Sidgwick, Mill and Laughlin). Appellant admits that "this combination cannot raise the price without raising it for the benefit of others, and the outsiders may or may not choose to raise their prices accordingly." (Mr. Carter, p. 32.)

But if "outsiders" elect to undersell the combination, still their competition will not affect the monopoly price of the combination, *unless they be capable of a production adequate to the supply of the entire market.*

So long as the combination by its control of production can prevent the supply being equal to the demand, it has the power to indefinitely increase price. "If the article is a necessary of life, which, rather than resign, people are willing to pay for at any price, a deficiency of one-third (withheld by the combination) may raise the price to double, triple, or quadruple." (2 Mill, 550, and note.)

"A partial control of the supply may render possible an artificial rise in the price of the commodity, even though the remainder is supplied by several sellers freely competing, *if only the proportion controlled is so large that its withdrawal would cause a serious scarcity, and thus considerably raise the competitively determined value of the uncontrolled remainder.*" (Sidgwick, 338.)

The validity of this ascertained law of economic science is susceptible of easy illustration and proof.

(*a*) Suppose that this combination controls *two-thirds* of the product of refined sugar, and the outside competitors *one-third,* and that while the combination demands *seven* cents a pound the competitors ask only *five* cents. Now, it is an axiom of political economy that there cannot be two prices for the same article in the same market, because, of course, everybody would buy the commodity at the lower price. It follows, therefore, that everybody would buy at *five* cents of the competitors. But competition between buyers enhances the price, and their competition would ultimately raise the price of the outside competitors to the

price of the combination, unless those competitors could supply the entire demand.

(*b*) Suppose, however, the *one-third* product of the outside competitors be taken at the *five* cent price. The demand, being yet unsatisfied, could be supplied only by the combination, which, having now a complete monopoly of the commodity, could extort a monopoly price — to the extent even of indemnifying itself for any loss it may have sustained by the previous competition.

Wherefore, if outside competitors cannot supply all the demand, they cannot prevent a monopoly price.

And this *a priori* deduction is confirmed by the observed fact, that competitors of a combination uniformly avail themselves of the monopoly price of the combination.

3d. At all events this combination is, in legal effect, a strict monopoly, for the evidence shows that it controls absolutely and completely the supply of sugar in the State of New York, and such control in a single State is held by the courts of that State to be a monopoly. (Lawrence *vs.* Kidder, 10 Barb., 642; Dunlop *vs.* Gregory, 10 N. Y., 244; West Virginia, &c., *vs.* Company, 46 Am. Rep., 529.)

II.—Advancing now to appellant's main argument, namely, that although this combination extinguishes all competition among its members, yet it is impotent to control or arrest the larger competition of capital invited by the excessive prices

of the combination to invest in the production of sugar, and that so increased production will reduce price to its normal level, we answer:

1st. That the argument postulates free competition of capital with capital and of labor with labor. Whereas, the utmost that can be affirmed in support of the argument is, that it is the *tendency* of labor to seek the highest wages, and of capital the largest profits; and so that it is the *tendency* of economic forces to maintain an equilibrium of price. The fallacy of appellant's argument lurks in the ambiguity of the word *tendency;* which means either the operation of causes that *will* produce a result, or the operation of causes that *may* produce a result, if not arrested or impeded by counteracting forces. (Whateley's Lectures on Pol. Econ., 231.)

In the latter sense appellant's proposition is true; in the former it is false. In point of fact many causes operate to hinder the free competition of labor and of capital — a fact attested conclusively by the prevalence of different rates of wages and of different rates of interest (Laughlin, Secs. 124-125). Hence, the utmost we may predicate of the competition of capital in redressing the balance of prices is, that such is its *tendency,* and possibly its *ultimate* result. "After due allowance is made for these various causes of inequality, difference in the risk and agreeableness of different employments, and natural or artificial monopolies, the rate of profit on capital in all employments *tends* to an equality" (1 Mill, 502). Again, "But in all

things which admit of indefinite multiplication, demand and supply only determine the perturbations of value during a period which cannot exceed the length of time necessary for altering the supply" (*id.*, 561). Mr. Carter himself says: "All the combinations in the world for the manufacture of refined sugar could never *permanently* keep up the price," etc. (p. 39), and that the reduction of price "may not occur in one month or two months or three months, and a temporary rise in price may be brought about in this manner," *i. e.*, by the combination (p. 33). So that assuming a free migration of capital in quest of profitable investment, there is still a complete absence of competition with the combination, for the long period during which outside refineries are building and equipping and getting their product upon the market; and of what havoc even a temporary monopoly is capable, we again adduce the Gold Ring of 1869 as a memorable and admonitory instance.

And then, if after a prolonged exaction of arbitrary and exorbitant prices, the combination ultimately collapses, under the strain of competition, the widespread disturbance of the market and financial ruin, exhibit another set of evils engendered by the system — as witness the recent explosion of the copper syndicate.

2d. Even after outside refineries shall be established, equipped and in operation, it by no means follows that they will compete with the combination in the reduction of prices (*supra*), and if they do,

experience, notably of the Standard Oil Company, demonstrates that nascent rivals are invariably crushed by established and powerful combinations, which, for that purpose, reduce prices until their competitor is driven from the field, and then indemnify themselves by aggravated plunder of the public.

In enumerating the classes of monopolies, the Cyclopædia of Political Science, etc., vol. II., p. 891, distinguishes: 1st. "The engrossing of a business by a combination of individuals, who by means of the vastness of the capital invested, drive out competitors, not by a superior service, or a lower normal price, which is the operation of the natural law of competition, but by losses deliberately incurred which they can bear and the competitor cannot, to be recouped by excessive charges when the competitor is made harmless."

XI

The Sugar Refineries combination is not justified by the economic law of "Large Production" (Laughlin, Sec. 50), *i. e.*, by the effect of aggregated capital and concentrated management, in reducing prices.

1st. The combination does not bring a single additional dollar to the production of sugar. The principle of division of labor is not more available and operative than before the combination. Neither is there any aggregation of capital or concentration of management; for, by express provi-

sion of the trust deed, "the several companies, parties to this agreement, shall maintain their separate organization and each shall carry on and conduct its own business." So each company maintains its own complement of salaried officers and servants, and, subject to the control of the board, directs its own affairs, and hence there is no economizing of expenditure. The cost of running each company is precisely what it was before the combination, and the business of each is still under a separate and several management. And the capital of each company remains in its own exchequer; only the certificates, representatives of that capital, are deposited with the board, in order to collect there the voting power of the companies.

2d. Such establishments as Macy's, Wanamaker's, etc., have no control of the production of commodities, and so cannot enhance prices; but are concerned only in the distribution of commodities, and so by the greater capital they employ, by so much increase the volume of supply, and by as much as they increase the volume of supply, by so much diminish prices. Their only chance of success is in underselling small dealers, and this they are enabled to do by the great aggregate income they realize from small profit on immense capital. Thus such establishments are the very opposite of monopoly; for while they live only by extending the area of demand and consumption to which a reduction of price is indispensable, monopoly thrives only upon a diminution of supply, by which ex-

pedient only can it command exaggerated prices. Demand and consumption are extended only by a decrease of price; but the end and aim of monopoly is increase of price, and this it surely accomplishes by curtailment of supply, instead of useless expenditure in augmented production, and the hazardous experiment of cheap prices.

If Macy and Wanamaker had a monopoly of commodities, they would exact their own prices; but now they can sell only by underbidding competitors.

XII

The example of the Standard Oil Company, adduced as an instance of the reduction of price by combination, involves the fallacy of the *petitio principii,* in assuming the very proposition to be proved, namely, that reduction of price was a *consequence of the combination.* True, the price of refined oil is less than before the existence of the combination; but *non liquet* that the combination was the *cause* of the reduction, since other causes adequate to the effect were in full operation, *e. g.*, increase of the raw material, diminution of the cost of production by improved processes and machinery, etc. *Non constat,* but that under free competition the price would have been still less; as probably it would have been, since all experience attests the efficacy of competition in the reduction of price. Indeed, we have the assurance of the highest authority that the fall in the price of refined oil was not *because,* but *in spite* of the Standard combination.

"Newspaper organs of monopoly tell us to admire the magnanimity of the Standard Oil people, who have reduced prices. This is a false statement. Prices have fallen in spite of the most strenuous efforts to keep them up. . . . They have always held back vast quantities of oil to maintain prices, and rumors reach us of a determined effort to diminish production." (Professor Ely, Problems of To-day, p. 144.)

XIII

The sugar combination finds no justification or support in the right accorded by law (Penal Code, Sec. 170) to associations of labor for the enhancement of wages.

The mischief of over-supply and inadequate values in commodities, the producer can and will correct by a reduced supply, thus restoring the equilibrium of prices. But sentient labor cannot withdraw from the market, it must eat or die; and, indeed, in proportion to the inadequacy of wages, is the increase in the supply of labor, for the deficiency of wages can be compensated only by longer work and conscripting the young and the old for the support of the family — the less the pay, the more the work necessary for subsistence. Then, too, since the labor class constitute the mass of society, and since the well-being of society depends upon the physical, intellectual and moral condition of the mass of its constituents, the law secures to labor the right of

recourse to the only expedient, combination, by which its condition may be bettered.

XIV

Nor is the case similar to the pooling arrangements between railroad carriers (which, however, are illegal, authorities *supra*), for there the evil of monopoly is checked by the power of the State to regulate prices. (Munn *vs.* Illinois, 94 U. S., 113; R.R. Commission Cases, 116 U. S., 307; Dow *vs.* Biedelman, 125 U. S., 680; People *vs.* R.R., 70 N. Y., 569.)

XV

Defendant's counsel assume that here was a *sale* of defendant's stock to "The Sugar Refineries Company." The relevancy of the point to the argument is not apparent; but indisputably the transaction has no feature of a sale.

1st. A sale implies a price for the thing bought; but here was no price paid or promised; and the trust certificates exchanged for the stock are only evidence of the holder's right to the stock deposited with the board, and to dividends on it.

2d. The deed provides in terms that the stock shall be held by the board "*as trustees.*"

3d. If the stock were sold to the board, it would be the property of the board, and the profits, as an incident of that property, would belong to the board; but by the provisions of the deed these profits are to be distributed in the form of dividends to

the holders of the certificates exchanged for the stock.

4th. If the corporate stock be sold to the board for the price of its certificates, then upon the dissolution of a corporation its assets would be the property of the board — a result which the stockholders in the corporation would be the last to accept.

5th. No rational mind can draw any other conclusion than that the corporate stock was transferred to the board for the sole purpose of imparting to the board the voting power of the stockholders — in other words the control of the corporation.

XVI

The fact that the arrangement imposes a copartnership liability on the associated corporations, is ineffectual to efface the illegality of the combination.

The assimilation of such a scheme to a copartnership was attempted in Stanton *vs.* Allen, 5 Denio, 442; but the Court dismissed the argument summarily with the remark, that "no one can be deceived by any supposed analogy between the principle of uniformity of price among members of an ordinary business firm, and the same thing in a confederacy formed for no other purpose or use than to bring it about."

XVII

Another argument by Mr. Carter is that the several interests implicated in the combination might

legally be consolidated in a single corporation; and that hence the present confederacy of corporations is invulnerable to attack.

But —

1st. It is no defense of the system assailed that another scheme constructed on a different principle might be legally unimpeachable. The argument proceeds on a false analogy; and it is no justification of one thing to show that another and different thing might be legal and legitimate.

2d. The argument involves not only a *non-sequitur,* but the assumption of a false premise, namely, that for the purpose and to the effect of securing a monopoly of the sugar refinery business, all the sugar refining interests of the country might legally be concentrated in a single company.

Any combination to do an act injurious to trade or commerce is a criminal conspiracy (Penal Code, Sec. 168, Sub. 6), and to prevent or restrict competition is injurious to trade and commerce (Leonard *vs.* Poole, 114 N. Y., 371; Hooker *vs.* Vanderwater, 4 Denio, 353; People *vs.* Fisher, 14 Wend., 19, and authorities *supra.*) An otherwise lawful combination becomes a crime if its intent be to form a monopoly (Parker, C. J., in Mitchell *vs.* Reynolds, 1 P. Williams, 181). Hence, it is an unwarrantable hypothesis to assume that the right of incorporation for legitimate business, involves the right to incorporate for an unlawful purpose. (Clancy *vs.* Salt Company, 62 Barb., 395; Endowment Fund *vs.* Sutchwell, 71 N. C., 111; 8 Am. St.

R., 192, note by Freeman; Richardson *vs.* Buhl, 7 R.R. & Corporation Law Journal, 89; People *vs.* Chicago Gas Trust, 41 Alb. Law J., 68.)

XVIII

It is no answer to the criticism of the sugar "combine" to say, that a man may do what he pleases with his own, that the stock in the several companies is the property of the shareholders, and that they may dispose of it at their pleasure.

For it is not a true proposition of law that a man may do as he chooses with his own, the fundamental principle is rather, *sic utere tuo ut alienum non lædas*, and every man's property is subject to the restriction that he shall not use it to the detriment of society. *Salus populi suprema lex.* It is upon this principle that the law condemns and confiscates property as a nuisance; it is by this principle that the law restrains in so many particulars the right of a man to contract (Stanton *vs.* Allen, 5 Denio, 441), especially forbidding him so to contract as to create monopoly. Authorities, *supra.*

"Every right, from absolute ownership in property down to a mere easement, is purchased and holden subject to the restriction that it shall be so exercised as not to injure others." (Coates *vs.* Mayor, 7 Cowen, 585.)

XIX

It is perfectly obvious that the scheme under discussion does not present a case of mere partial restraint of trade, for the benefit of the vendor of a

commodity or business (Diamond Match Co. *vs.* Roeber, 106 N. Y., 473; Leslie *vs.* Lorillard, 110 N. Y., 533; Watertown *vs.* Pool, 51 Hun, 157), but is, in purpose and effect, a combination of producers to monopolize and control the market, and hence cannot be vindicated upon the principle of those decisions.

XX

The scheme of combination constituted by the Sugar Refineries Company deed creates a monopoly in the strictest and most absolute sense, *i. e.,* a single seller. It concentrates the power of production and supply in a single body, actuated by a single and common interest; it excludes the possibility of competition, and it tends inevitably to the enhancement of price. Thus the combination is illegal and criminal; and since "a corporation has no authority to do acts which by the public law are indictable" (State *vs.* Krebs, 64 N. C., 604); since acts *ultra vires, i. e.,* abuse of corporate powers (Code Civ. Pro., Sec. 1798, Sub. 2), and "a violation of any provision of law (*id.*) are express statutory grounds of forfeiture, it results that the verdict was well directed against defendant.

And that the intervention of the Courts is challenged by the urgency of the public interest, is evident from the mischievous consequences of trust combinations.

"If it is to be the future order of things that each of the industries is to be in charge of one trust, and

competition thereby excluded, what follows? Among other things such as these:

(1) The creation of as many distinct dominating classes as we have industries, to whom all other interests will be selfishly subject and subordinated. (2) A domination of capital over labor which would leave to the workman, not the highest wages he could get from among a host of competitors for his labor, but just what the one monopolist employer may arbitrarily choose to give him. (3) The discouragement of the production of raw materials through the constant forcing down of their price that comes by confining the demand to one purchaser. (4) The discouragement of invention by restricting production to one mammoth corporation; who, with no fear of a competitor before their eyes, would be less necessitated to keep up with the march of discovery and little disposed to prematurely destroy old plant for better. (5) The creation of fierce antagonisms between trusts whose interests might be conflicting, causing interruptions to business far more serious than those we suffer from the worst forms of strike. (6) The subjecting of the whole distributing trade to just such conditions and compensations as the monopolist producer may choose to dictate, with no possibility of recourse or redress. (7) The old plant of our industries (which should have been allowed to give place to new in a natural way), having been absorbed into the monopolies, will have to do duty with the improved, and will thus be conserved to act as a drag upon the

efficiency and economy of production. (8) The introduction of very serious changes in the relations of banking to commerce; for, under the trust system, the banks would have to carry a whole industry in one solid block, and not, as at present, divided among a wide diversity of individual firms. (9) The owning and control of the banks, in a large measure, by the monopolies, in order to protect their own mammoth interests and also to hold in the more complete subjection such other interests as might not relish their industrial domination. (19) The creation of an industrial aristocracy of immense power, which would foster class hostilities, embitter politics and endanger the Republic."—*New York Daily Commercial Bulletin,* 1st April, 1889.

XXI

Defendant corporation is party to the Sugar Refineries Company deed.

1.—In September, 1887, George H. Moller, then secretary of the defendant company, signed the deed thus: "North River Sugar Refining Company, Geo. H. Moller, Secretary" (folios 98-99); and he so signed under and pursuant to a resolution of a meeting comprising all the stockholders and trustees of the company (folio 99), declaring it to be "for the interest of the North River Sugar Refining Company to participate in the consolidation" of the Sugar Refineries (folio 103), and authorizing "the President and Secretary . . . to sign all contracts, agreements and papers which the above com-

mittee may make in relation to the said consolidation" (folio 104) — *i. e.*, the combination in question. And he so signed in the belief that he had authority to sign from the stockholders and trustees (folio 98).

Plainly, if Moller had authority to execute the instrument in behalf of the company, the subsequent resolution of November 4th, 1887, purporting to revoke that authority, was ineffectual to cancel an execution already consummated.

The preamble to the resolution of November 4th, declared that "it is deemed inexpedient *at the present time* to enter into any such consolidation" (folio 108). Thus, the resolution to go into the combination was not rescinded, but was only postponed in the time and modified in the mode of execution. So, at a meeting of stockholders of the company, held 25th November, 1887, it was recited that whereas Moller had signed the deed under the belief that he was authorized so to do, providing for the delivery of the stock of the company to trustees therein named (folio 119); and whereas, "John E. Searles, Jr., had offered to purchase the capital stock of said North River Sugar Refining Company for the sum of $325,000," it was "Resolved, that Peter Moller, Jr., George H. Moller and Gerd Martens be and they are hereby appointed a committee to deliver said stock to John E. Searles, Jr. (member, secretary and treasurer of the board), or at his request to John E. Parsons, John R. Dos Passos and Franklin Bartlett, trustees" (folio 120), ap-

pointed by the board to receive the stock from the individual stockholders; so as to make "certain that the stockholders of all corporations had assented," before the issue of certificates for the stock (folio 196); and then to transfer the stock to the board (folio 161).

Accordingly, all the stock of the North River Sugar Refining Company was transferred, by blank assignments, to John E. Searles, Jr. (folio 115), who purchased for the Sugar Refineries Company (folio 161); he transferred it to the named trustees, and they transferred it to the Sugar Refineries Company (folios 161, 163).

Obviously, the resolution of the 25th of November, coupled with the acts done pursuant to it, was a ratification of George H. Moller's execution of the deed — namely, he had agreed for the company that it should become a party to the consolidation; and the resolution and consequent action of the company made it a party to the consolidation. Every right and every obligation conferred or imposed upon the company or its stockholders by Moller's execution became, in fact, the right and obligation of the company or its stockholders — they are both in precisely the same situation they would have been in under Moller's execution — and the deed still bears the signature "North River Sugar Refining Company, George H. Moller, Secretary"; the company is still a party to the deed.

2.—Upon the supposition that Moller's signature was a nullity, still one may be a party to an instru-

ment without a formal, technical execution of it — without signing it. It is common learning that a grantee in a conveyance becomes a party to it and is bound by its covenants, by taking the benefit of it and without executing it. Here, the North River Sugar Refining Company or its shareholders — whoever they be — have done what the deed required of them, *i. e.,* transferred their stock to the board (folios 139, 139, 163, 139, 155), have got what the deed guaranteed to them, namely, the certificates of the Sugar Refining Company (folios 138, 155, 163). This board, the Sugar Refineries Company, was constituted and created under and pursuant to the deed (folios 138). The stock was transferred to the board in conformity with the terms of the deed (folios 142, 154). Certificates for the North River Company's stock were to be issued for "the amount specified in the deed" (folio 154), and were received from the board (folio 159). The board holds the North River Company stock "subject to the purposes set forth in the deed" (folio 158). The *fifteen per cent* reserved out of the $700,000 certificates allotted to the North River Company, was so reserved under the deed (folios 228, 237, 239) —"the original agreement with the North River Company" (folios 286, 242).

Finally, the North River Company, or its stockholders, have been awarded the dividend stipulated by the deed (fol. 201).

Beyond all controversy, the North River Com-

pany, or its stockholders, have acted upon the provisions of the deed, have received and enjoy the benefits of it, and so are parties to it; if not upon the original execution of Moller, then as effectually by subsequent adoption and ratification. (The Sheldon Company *vs.* the Eickmeyer Co., 90 N. Y., 607; President, &c., *vs.* R. R. Co., 7 Lans., 240.)

XXII

But the controlling question of fact is, not whether the defendant was a party to the deed, but whether *it is in the combination?* The allegation of the complaint is that, "said agreement constitutes a combination to do an act injurious to trade and commerce, to *which combination defendant is a party*" (folio 43).

I—By the essential principle and policy of the scheme, the *corporations* are parties to the combination, thus:

1st. The board is created by the corporations.

2d. The deed explicitly provides that none but *corporations* can be parties to the combination.

3d. The deed recites, "The several corporations, *parties to this agreement,*" etc.

4th. "The several *corporations* shall be entitled to the shares" of trust stock.

5th. Provision is made for the acquisition of other refineries "to become parties to this deed."

6th. The profits of each corporation is to be paid over by *it* to the board, etc.

7th. The *corporations* stipulate for the transfer of their stock.

8th. Each *corporation* agrees to maintain its separate organization, etc.

9th. Funds for the board are to be raised "by mortgage to be made by the *corporations* on their property."

10th. The profits of the *corporations,* before declaration of a dividend, are to be turned into the board.

11th. Nowhere does the deed recognize stockholders as parties to the instrument or constituents of the company; but on the contrary, the essential principle of the scheme is, that it is the creation of the corporations.

Obviously and undisputably, the corporations, as such, are the constituents of the combination.

II—Defendant might become a party to the *combination* without being technically and formally a party to the *deed.*

The agreement created and constituted the combination. The combination is the effect of the agreement. An agreement to form a combination is one thing; the consummation of the combination is another substantive thing.

Defendant might go into the combination after its formation, without having previously executed the agreement. It appears on the face of the agreement that some individuals signed it; but individuals could not join the combination; they were organized as corporations, and those corporations after-

ward went into the combination, although they had never signed the agreement.

III—Whether defendant be in the combination is determined exclusively and decisively by the transfer of its stock to the board, named the Sugar Refineries Company. The answer admits that "the owners of corporate stock of this defendant, and of other sugar refinery companies, have assigned and transferred their stock to the said persons called the Sugar Refineries Company" (folio 57), and the fact appears also in the evidence (folios 115, 121, 138). Armed with the voting power of defendant corporation, the board has absolute control of the corporation, and is bound by the deed under which it holds its stock, to exert that control in the interest and for the aggrandizement of the combination.

IV—This defendant, in a peculiar and emphatic sense, is a party to the combination; for while the board is only nominal owner of the stock of other companies, the beneficial ownership being in the holders of the certificates for which it was exchanged; of defendant's stock, while the board holds the legal title, the beneficial interest is in the association; for defendant's stock was bought by Searles in behalf of the combination, was paid for by the money of the combination (folios 160, 163), and, accordingly, the dividend declared upon defendant's stock is retained in the treasury of the combination (folio 204).

V—The declaration of a dividend by the board upon defendant's stock (folio 201) affords con-

clusive evidence of its connection with the combination.

VI—To the argument that since appellant had no legal power to enter the combination, in contemplation of law *it has not entered* the combination, the Court of Appeals furnishes a conclusive answer in the Matter of McGraw, 111 N. Y., 106.

XXIII

Defendant corporation was carried into the combination by the concurrent action of all the stockholders and trustees — action, taken not as *individuals,* but as *stockholders and trustees,* and taken for the express purpose of placing the corporation within the grasp and control of the combination.

1—The original resolution of April 22d, 1887, authorizing the accession of the company, and as a company (folio 103), was adopted at a regular meeting of the stockholders, all the trustees being present and voting for the resolution (folios 104 and 105). The resolution of the 25th November, 1887, authorizing the sale and transfer of defendant's stock to Searles was adopted at a regular meeting of stockholders, all being present except two, and they "consenting and delivering up their stock" (folios 116-118). At this meeting all the trustees were present and voted for the resolution (folios 101, 116, 118, 121).

In every instance the board had assurance that the transfer of stock was made by authority of "all the stockholders" (folio 195).

"The agreement was in fact made and the mortgage authorized by all the stockholders. They were, it is true, also trustees, but their assent in that capacity *must bind them* in both characters." (Paulding *vs.* Company, 94 N. Y., 341.)

2.—Searles, being sole owner of defendant's stock, being in fact the company ("I was the North River Sugar Refining Company"), (folio 150), transferred it to the Sugar Refineries Board (folio 139). Thus by the action of all its stockholders and trustees, defendant company was taken into the combination, and there it is to-day.

3.—And, not only was defendant carried into the combination by the act of its stockholders *as such;* but its present stockholders, *as such*, are the men who compose and control the combination.

XXIV

On the hypothesis that by no act of its trustees, *as such,* was defendant introduced into the combination, we answer that in *quo warranto* to dissolve a corporation, it is the misconduct of the *corporators* that operates a forfeiture of the corporate franchise.

1.—The corporation itself — the metaphysical entity — is obviously incapable of action. Its "concerns" are "managed" by the board of trustees (Act 1848, Section 3); but these trustees are "elected by the stockholders" (*id.*), who therefore constitute the ultimate and supreme power in the corporation. The will of the *corporators* is the will

of the *corporation;* the property of the *corporation* is virtually the property of the *corporators;* the gains of the *corporation* are the gains of the *corporators,* and *its* losses *their* losses. The *corporators* constitute the *corporation;* so that if *they* all die it dies (Field on Corp., 449; Boone on Corp., Sect. 199). In fact the *corporators* are the *corporation,* and the notion of a corporate entity, distinct and apart from the natural persons composing the corporation — of a body independent of its members — of a substance separate from its constituents — this notion, invented by the subtle intellect of Coke, " for the purpose of perpetual succession " (Marshall, C. J., in Dartmouth College Case, 4 Wheaton, 636), is an empty fiction, and, as such, of no weight in the present discussion. On this point the authorities are clear and conclusive.

" The right of acting as a corporation is a franchise in the individuals that compose it." (2 Kyd on Corp., 475.)

" A corporation in the concrete is taken for the particular members of such corporation." (Ayliffe, Civ. Law, 196.)

" The corporation consists of the whole number of members." (1 Morawetz on Corp., Sec. 474.)

" A corporation is a collection of individuals in one body." (Bronson, J., in People *vs.* Assessors, 1 Hill, 620.)

" Corporations are little more than aggregations of individuals united for some legitimate purpose

and acting as a single body." (McKinley *vs.* Wheeler, 130 U. S., 633.)

"A corporation is really an association of persons, and no judicial dictum or legislative enactment can alter this fact." (1 Mora. on Corp., Sec. 227.)

"A corporation generally consists of members in their natural capacity." (1 Waterman on Corp., Sec. 5.)

"Corporations are merely associations of individuals united for a special purpose, and permitted to do business under a particular name, and have a succession of members without dissolution." (Pembina *vs.* Pennsylvania, 125 U. S., 189.)

"The word 'corporations' is but a collective name for the corporators or members — a corporation is not a reality or thing distinct from its constituent parts." (1 Mora., Sec. 1.)

"A corporation and its shareholders are in reality the same." (2 Mora. on Corp., Sec. 852.)

"The shareholders, then, vested with the corporate powers, are the body corporate, corporation, or company." (Taylor on Corp., Sec. 50.)

"A stockholder is an integral part of the corporation," and so without notice to himself, he is bound by notice to the corporation. (Sanger *vs.* Upton, 91 U. S., 59; Glenn *vs.* Soule, 22 Fed. Rep., 417.)

"The property of the corporation belongs equitably to the stockholders; and they are virtually the debtors of the creditors of the corporation." (Pet-

tibone *vs.* Toledo, &c., Co., 39 Alb. Law J., 147, Mass. Supreme Judical Court; Bissell *vs.* R. R. Co., 22 N. Y., 259.)

In an action against a corporation stockholders are represented by the corporation, and a judgment against *it* conclusively binds them. (Cook on Stock, &c., Sec. 209; Mora., Sec. 865.)

"The corporation of London is the citizens of London." (City, &c., *vs.* Wood, 12 Modern, 669.)

"The people of the locality constitute the political corporation." (Clark *vs.* Rochester, 24 Barb., 446, 473.)

The individual members are the corporation, and hence citizenship of members determines Federal jurisdiction of the corporation.

"If the corporation be considered as a mere faculty, and not as *a company of individuals,* who in transacting their joint concerns may use a legal name, they must be excluded from the courts of the Union." (Marshall, C. J., in Bank *vs.* Deveaux, 5 Cranch., 61, 87; Louisville *vs.* Letson, 2 How. (U. S.), 497. 552.)

"When the certificate shall have been filed, etc., *the persons* who shall have signed and acknowledged the same"— and of course their successors — "shall be a *body politic and corporate.*" (Act 1848, Sec. 2.)

2.—The corporate franchises vest, not in the *corporation,* but in the *corporators.*

"A grant of corporate existence is a grant of special privileges to the *corporators,* enabling *them*

to act for certain designated purposes as a single individual." (Paul *vs.* Virginia, 8 Wall., 181.)

"Corporate franchises are privileges conferred by grant from the Government, vested in private individuals. They contain an implied covenant on the part of the Government not to invade the rights vested, and on the part of the grantee" (*i. e.,* the individuals) "to execute the conditions and duties prescribed in the grant." (3 Kent, 458; People *vs.* Utica, 15 Johns., 387; State *vs.* Bank, 41 Am. Dec., 112.)

"The franchise to be and act as a corporation vests in the individuals who compose the corporation, and not in the corporation itself," and hence, does not pass by the assignment of the corporation. (Fietsam *vs.* Hay, 122 Ill., 293.)

"We have supposed, if anything was settled by an unbroken course of decisions in the Federal and State courts, it was that an act of incorporation was a contract between the State and the *stockholders.* All courts, at this day, are estopped from questioning the doctrine." (Davis, J., in Binghamton Bridge Case, 3 Wall., 51, 73; Wilmington R. R. Co. *vs.* Reid, 13 Wallace, 266; The Delaware R. R. Tax Case, 18 Wallace, 225; Erie, &c., *vs.* Casey, 26 Pa. St., 287.)

3.—It results, therefore, obviously and irrefragably, that since the corporate franchise vests in the *corporators,* and the act of incorporation constitutes a contract between *them* and the Government, it is *their* act which operates a forfeiture of the fran-

chise, and *their* misconduct which incurs the penalty of forfeiture of *their* franchise.

And so are the authorities.

" Any particular member of a corporation may be disfranchised or lose his place in the corporation by acting contrary to the laws of the land." (1 Black Com., 484, marginal.)

And, " as every member may forfeit that which any member may, the same acts which will forfeit the rights of every member separately, if done jointly by all the members, will be a forfeiture of the corporate existence." (2 Kyd, 477.)

" When the question is of the non-user or abuse of franchises by a corporation, it must of necessity be intended of the acts or negligence of the natural persons, or of those officers who were empowered by them." (2 Kyd, 478.)

" Though the proceedings be against the corporate body, it is the acts or omissions of the *individual corporators* that is the subject of the judgment of the Court. The powers and privileges are conferred, and the conditions enjoined upon *them; they* obtain the grant and engage to perform the conditions." (People *vs.* Kingston, &c., 28 Wend., 205.)

Accordingly, in Denike *vs.* Company, 80 N. Y., 606, it was held that " all the stockholders of a corporation uniting might undoubtedly surrender the franchises and work its dissolution,"—and this though the statute (Sec. 2419, Code Civ. Pro.) prescribes that a voluntary dissolution shall be upon

the petition of the trustees. (S. P. Webster *vs.* Turner, 12 Hun, 264.)

XXV

Party to a combination of which the effect is obvious and inevitable, defendant will be held to intend that effect. Indeed, any other purpose of the parties to the combination than to prevent competition and enhance price is inconceivable. (Haire *vs.* Wilson, 9 B. & C., 643; Denny *vs.* Dana, 2 Cush., 160.)

"In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect." (Henderson *vs.* The Mayor, 92 U. S., 259.)

XXVI

The case then, is this: The persons who procured the charter of defendant company were endowed by the State with the corporate franchise and the faculties of a body politic, in consideration of the benefit to the public from an increased production of refined sugar, and the consequent greater supply and less price to the community; but so far from appearing in the market as an independent producer, and a competitor in the supply of the commodity, and a factor in the reduction of its price, defendant company, by the agency of its constituent members, is introduced into a combination of sugar refineries, of which the apparent and inevitable operation is to limit production, diminish supply,

and enhance prices. Indisputably, here is a violation of the trust and a breach of the condition upon which the corporate franchise was conceded to defendant. Indisputably defendant's corporate faculties, instead of conducing to the benefit of the public, are perverted to its detriment, and, consequently, it has incurred a forfeiture of its franchises.

"The stated purpose for which the 'American Sugar Refinery Company' became incorporated was the production — the competitive production — of sugar to supply human want; the business franchise granted was not for the sole benefit of the corporation or its stockholders, but, in a measure, for that of the public as well; the understood commercial policy underlying the grant, and to the observance of which the defendant, by accepting it, stood committed, looked to the promotion of trade in that commodity — the promotion of trade necessarily denotes the encouragement of rivalry in the business — competition on equal terms is conceded to be the life of trade, and to invite and promote that competition is the established policy of our laws. As competition tends to create trade, so monopoly tends to destroy it. This is the axiom which underlies the constitution and general legislation of this State, and upon which the decisions of its courts have habitually, not to say uniformly, proceeded." (People, &c., *vs.* The American Sugar Ref. Co., 7 Railway & Corp. Law Journal, 86.)

If a monopoly combination among natural persons be contrary to law, much more is it so between

corporations; because *ultra vires,* and because repugnant to the aim of corporate institution, "the true ground and original of corporations being the increase and advancement of trade and merchandise." (Sir Robert Atkin's Case, 3 Modern, 12.)

XXVII

Independently of the character of the combination, *i. e.,* as tending to monopoly and repugnant to public policy, defendant, by joining it, did an act *ultra vires* in abuse of its powers, and in perversion of its institution; and so incurred the statutory penalty, namely, forfeiture of its corporate franchise.

I—That defendant was guilty of an excess, and so of an abuse, of its powers, in becoming a party to the combination, is palpable upon a survey of the constitution of The Sugar Refineries Company, and its relations to the associated corporations.

(a) CONSTITUTION OF THE COMPANY

1st. To have a corporate name—"The Sugar Refineries Company."
2d. To have a common seal.
3d. To have a capital stock.
4th. To divide its capital stock into shares.
5th. To issue negotiable certificates of stock.
6th. To have perpetual succession.
7th. To make by-laws.
8th. To institute offices.

9th. To have power of amotion.

And, as the Board consists of more than *seven* members, the law annexes to it these additional attributes.

10th. To sue and be sued as a substantive legal entity (Code Civ. Pro., Secs. 1919, 1920, 1812, 264).

11th. To take hold and convey property (Laws 1867, Ch. 289; Waterbury *vs.* Company, 50 Barb., 160).

Possessing every faculty of a corporation except irresponsibility of members for liabilities of the body, the Company is, by the law of New York, a Joint Stock Association. (2 Bouvier's Law Dict., "Joint Stock Company"; Laws 1849, Ch. 258; New York Const., Art. 8, Sec. 1; People *vs.* Wemple, 7 R. R. & Corp. Law Journal, 127; Waterbury *vs.* Company, 50 Barb., 157; Liverpool Ins. Co. *vs.* Massachusetts, 10 Wallace, 566; Westcott *vs.* Fargo, 61 N. Y., 547; The Bank *vs.* Vanderwerker, 74 N. Y., 234; 1 Waterman on Corp., Sec. 10; Cook on Stock, &c., Secs. 504, 506).

(b) RELATION OF CORPORATIONS TO COMPANY

1st. The Company is created by the corporations.

2d. It is called "The *Sugar Refineries* Company."

3d. The capital stock of "*each corporation*"— not to the shareholders individually — is transferred to the board.

4th. The *corporations* "shall be entitled to

shares" in the Sugar Refineries Company; and "of the shares allotted to the several refineries," &c.

5th. The profits arising from each corporation shall be paid over by *it* to the board.

6th. The funds necessary for the board are to be raised "by mortgages to be made by the corporations."

7th. The board qualifies trustees of the corporations by the transfer of corporate stock "to be retransferred when requested by the board."

8th. The stock of the corporations is held by the board with all the rights and powers incident to stockholders in the several corporations.

9th. The stock of the corporations constitutes the only capital of the company.

10th. The stock of the corporations is exchanged for the stock of "The Sugar Refineries Company"— this company taking the place of the shareholders in the corporations. Thus, membership in "The Sugar Refineries Company" is substituted for membership in the corporation.

11th. The corporations, *as corporations,* are parties to the instrument creating the board.

Here, then, is a joint-stock association with a capital of $50,000,000, holding all the stock of the several corporations, receiving all the profits of the several corporations, appointing, in effect, all the trustees of the several corporations, and grasping an absolute control of the several corporations in the conduct of their business and the disposition of their property. Plainly it was *ultra vires* and an

abuse of the powers of the corporations to contract *such* relations to *such* a body.

II—" A statutory corporation is limited as to all its powers, by the purposes of its incorporations as defined in the act. The Memorandum of Incorporation" *(i. e.,* certificate of incorporation), " is their fundamental and their unalterable law; and they are incorporated only for the objects and purposes expressed in the memorandum" (certificate). (Lord Selborne in Ashbury, &c., Co. *vs.* Riche, L. R., 7 H. L., 653.)

" When a corporation is organized through articles of association entered into under general laws, the memorandum of association stands in the place of a legislative charter, in so far that its powers cannot exceed those enumerated therein; but powers enumerated and claimed therein which are not warranted by statute are void for want of authority." (Oregon *vs.* Ry. Co., 130 U. S., 2; The Eastern, &c., *vs.* Vaughan, 14 N. Y., 546, 551; People *vs.* Chicago Gas Trust, *supra.*)

By Section 1, Act 1848, the certificate of incorporation must state the objects for which the " company is formed," and " the purpose of the organization is limited to one of the general classes of business, designated in the act, as manufacturing, mining, mechanical or chemical." (The People *vs.* Beach, 19 Hun, 260.)

Defendant's declared object is " the manufacture and sale of sugar, syrups and molasses." Thus, neither by their charter, nor by the Act of 1848, nor

by the general statute defining corporate powers (Rev. Stat., Section 1, Title 3, Ch. 18, Part 1), have these corporations authority to contract the alliance with the Sugar Refineries Company.

"A corporation so formed is a manufacturing corporation with powers limited to the accomplishment of the purposes so declared." (Astor *vs.* Arcade R. Co., 113 N. Y., 93.)

III—A corporation cannot be created merely for the purpose of consolidating with another. (Church *vs.* Perry, 20 N. Y. State Rep., 633.)

A corporation can make no contract which is not necessary, directly or incidentally, to enable it to answer the purpose of its charter. (Beach *vs.* Fulton, 3 Wend., 573; Legnard *vs.* Association, 80 N. Y., 638; Millbank *vs.* R. R. Co., 64 How., 23-25; Rock River *vs.* Sherwood, 10 Wisc., 230; Abbey *vs.* Billups, 35 Miss., 618; Davis vs. Old Colony, 131 Mass., 258; Pierce on Railroads, 500, note; Boone on Corp., Sec. 43.)

Hence, *held* that a gas company cannot purchase the stock of another company, because "there is no necessary connection between manufacturing gas and buying stock." (People *vs.* Chicago Gas Trust, 22 Chicago Legal News, 107.)

IV—The connection with "The Sugar Refineries Company" is not necessary to enable the corporations to answer the end of their existence; nor is the contract of connection made in the legitimate prosecution of their business, and hence, the contract and connection are *ultra vires* and an abuse of corporate

power. (People *vs.* Chicago Gas Trust, 22 Chicago Legal News, 107; Hood *vs.* R. R. Co., 22 Conn., 1; Franklin *vs.* Lewiston, 68 Maine, 43.)

XXVIII

The combination between the several corporations, resulting from the transfer of their stock to the board, "subject to the purposes set forth in this deed," if not in legal conception, is in practical effect an amalgamation or consolidation of these corporations — or, at all events, a copartnership between them. (Pittsburg *vs.* McMillin, 53 Hun, 67, 69; Champion *vs.* Bostwick, 18 Wend., 175, 183; Burnett *vs.* Snyder, 81 N. Y., 555; Stroker *vs.* Elting, 97 N. Y., 102, 105.)

Indeed, that the combination constitutes a partnership between the corporations is conceded by the apologists of the Trust. (Prof. Dwight's Essay, 3 Political Science Quarterly, 624.)

I—The avowed object of the combination was a *consolidation* of the several corporations (folios 107, 119.)

II—And such is the result.

1st. The stockholders in each are stockholders in all — indeed, the stock of all is blended in a single and indistinguishable mass.

2d. The profits of each are the profits of all, and the losses of each the losses of all; and thus an absolute unity and identity of interest pervades the aggregate of associated corporations.

3d. The voting power in each is the voting

power in all; and so an aboslute unity and identity of control dominates and directs the action of the aggregate of associated corporations.

4th. Here, then, is an organic union — a fusion of separate individualities in an indivisible unit — in short, an amalgamation and consolidation of the distinct corporate existences; and the several and separate entity of each corporation is a mere fiction, without practical force or efficacy.

5th. A common name, "The Sugar Refineries Company," distinguishes the unity of combination into which the several corporations are consolidated.

6th. The association involves the essential and decisive principles of partnership; namely, a community of capital — the stock contributed to the board by the several corporations — and a community of profit and loss among the members of the association.

III—But, "corporations cannot consolidate their funds or form a partnership, unless authorized by express grant or necessary implication." (The N. Y. Canal Co. *vs.* Sharon, 7 Wend., 412.)

"Without legislative authority corporations organized separately cannot merge and consolidate their interests." (Clearwater *vs.* Meredith, 1 Wall., 25, 29.)

In Massachusetts (as in New York) the exclusive management of manufacturing corporations is vested in the trustees; and hence, *held* that such a corporation has no power to form a copartnership; because, *first,* it would subject the corporation to

the control of the partner, and, *secondly*, would subject the corporation to the copartnership liabilities. (Whittenton *vs.* Upton, 10 Gray, 596-597.)

"An agreement that the profits and loss shall be brought into one common fund and the net receipts divided, without the authority of an act of Parliament, appears to me clearly and palpably illegal; otherwise it might be that all the railways in the kingdom might be collected into one vast joint-stock concern." (V. C. Wood in Charlton *vs.* R'ys, 5 Jurist N. S., 1096, 1100.)

"There was no authority of law to consolidate these two corporations, and to place both under the same management, or to subject the capital of one to answer for the other." (Pearce *vs.* R. R. Co., 21 How. U. S., 443.)

"Contracts between corporations which create in fact, if not in name, partnerships, are void on the double ground of being *ultra vires* and also contrary to public policy." (Green's Brice, 416, 425 (2d Ed.)

"A corporation cannot enter any arrangement amounting to a virtual consolidation or partnership." (1 Morawetz on Corp., Sec. 376, acc. A. & A. on Corp., Sec. 272; Parsons on Partnership, p. 29; Marine Bank *vs.* Ogden, 29 Ill., 248; Taylor on Corp., Secs. 419-420; Mallory *vs.* Oil Works, 2 Pickle (Tenn.), 598; Pierson *vs.* McCurdy, 33 Hun, 520, 522; French *vs.* Donohue, 29 Minn., 111; Coleman *vs.* R'y Co., 10 Beavan, 1.)

"Of what avail is it that any number of gas

companies may be formed under the general law, if a giant trust company can be clothed with the power of holding the stock and property of such companies, and through the control thereby obtained, can direct all their operations, and weld them into one huge combination?" (People *vs.* Chicago Gas Trust Co., *supra.)*

And although corporations under the acts supplementary to the Act of 1848 have a qualified right of consolidation, yet here is no such consolidation as the statute allows and prescribes. All statutory formalities must be complied with, to perfect a consolidation. (Peninsular R. R. Co. *vs.* Thorp, 28 Mich., 506; Tuttle *vs.* R. R. Co., 35 Mich., 247.)

XXIX

Defendant corporation has forfeited its charter by the transfer of its control to "The Sugar Refineries Company."

1.—"The Sugar Refineries Company" is a body or board foreign to defendant corporation — not recognized by its charter — and this body or board, by virtue of its right to vote defendant's stock, dominates it by an absolute and exclusive control. The autonomy of the constituent corporations is abolished; and they become mere subordinates and satellites of the central and supreme syndicate.

"The corporations thus associated renounce autonomy. . . . The stock was transferred to

the trust, not for the purpose of being sold, but to give control of the corporations; to make the officers puppets in the hands of the trust, and thus substitute the latter as the governing body of the corporations." (Gould *vs.* Head, 38 Fed. Rep., 888.)

"Transfer of all stock to the board gave the board control of the corporate policy and management of the corporate business." (People *vs.* American Sugar Refining Co., 7 Railway & Corp. Jour., 84, 85.)

2.—By Section 3, Act 1848, the exclusive management of "the stock, property and concerns" of defendant is vested in its board of trustees, themselves to be stockholders, and to be chosen by the stockholders. Here, the trustees are appointed by the board, and they are stockholders only *in name*, holding their stock by transfer from the board, and compellable on demand to retransfer it to the board; and it was an act *ultra vires* for defendant to surrender its control and management to "The Sugar Refineries Company"; and so, defendant has forfeited its charter by "offending against the Act by and under which it was created." (Code Civ. Pro., Sec. 1798.)

In the Central R. R. Co. *vs.* Collins, 40 Ga., 583, the Court say: "It is a part of the public policy of the State to secure a reasonable competition between its railroads, and it is contrary to that policy for one of said roads to attempt to secure a controlling interest in another by the purchase of its

stock; and any contract made with that view is illegal."

"The purchase by one R. R. Company of the stock of another, with the object of preventing competition, is against public policy and void." (Elkins *vs.* R. R. Co, 36, N. J. Eq., 5.)

"Transfers of powers of one corporation to another, without the authority of the Legislature, are against public policy." (Chicago, &c., *vs.* Gas Co., 2 Am. State Reports, 124.)

In Bradford, &c., R. R. Co. *vs.* N. Y., &c., R. R. Co., 16 N. Y. State Reporter, 208, the case was this: The Bradford R. R. Co., a tributary of the N. Y., Lake Erie and Western R. R. Company, desired the assistance of the latter company in the completion of its road, and to that end the Bradford Company engaged "to cause to be deposited" with the Erie Company "a majority of its capital stock," so as to give the Erie Company "the right to vote upon the stock so deposited." Accordingly, "a majority of the owners of the Bradford Company stock deposited it with the Erie Company," but the Court, per Daniels, J., held the agreement illegal, because it so transferred the control of the Bradford Company to the Erie Company.

This case is obviously identical with the present as to the point in discussion; but the principle is established by abundant authority. (Whitterton *vs.* Upton, 10 Gray, 596-7; Simpson *vs.* Denison, 10 Hare, 51; Richmond *vs.* Vestry, 3 Ch. Div., 82; Winch *vs.* Birkenhend, 5 DeG. & Sim., 567; Be-

man *vs.* Rufford, 6 Eng. L. & Eq., 106; Hafer *vs.* R. R. Co., 19 Abb. N. C., 454; Vanderbilt *vs.* Bennett, 19 Abb. N. C., 460; Thomas *vs.* R. R. Co., 101 U. S., 83; Ohio & Miss., &c., *vs.* R. R. Co., 5 Am. Law Register (N. S), 733.)

"During the argument counsel invoked the aid of the undoubted general principle that the ownership of shares of stock, as of other property, carries with it the legal right to sell, and contended that the owners of the shares of the South Pennsylvania Railroad Company could not legally be restrained from so doing, and that an injunction against the purchaser would have that effect. We do not think the principle applies to this case. We are not called upon to express any opinion as to the right of the individual shareholders to sell their several shares *bona fide* in the open market. This, so far as they are concerned, is an intended sale in combination for the express purpose of enabling them to abandon the rights and duties conferred and imposed upon them by the act incorporating the company and of putting the control of their corporation into the hands of its rival. This is an act contrary to the public policy of the State, which they have no right to do." (Penn. R. R. Co. *vs.* Commonwealth, 7 Atl. Rep., 373.)

"It is against public policy to permit one corporation to embarrass and control another and perhaps competing corporation in the management of its affairs, as may be done if it is permitted to pur-

chase and vote upon the stock." (Milbank *vs.* R. R. Co., 64 How., 28.)

"That an individual stockholder in a private corporation formed for business purposes may, at will, transfer to another his shares of stock is of course not to be questioned, neither it is doubted that any number, even all, of the stockholders may by concert had between them sell their shares and sell them to a purchaser previously agreed upon by all. But to my mind it is equally clear that when, as the necessary legal result of such a sale of stock, a transfer of the corporate franchise has been effected, the State — the people — who granted the franchise, granted it upon conditions to be observed and fulfilled by the grantee, may institute an inquiry — legislative, through their political representatives, or judicial, through the instrumentality of their courts — an inquiry into the purpose for which the franchise has been so transferred, an inquiry whether such purpose be in itself lawful or unlawful, and whether as the result of such transfer the franchise is employed in such manner or in a business of such a character as operates a breach of the conditions annexed to the grant." (People *vs.* American Sugar Refinery Company, 7 Railway & Corp. Law Journal, 86.)

And held of this identical combination, that by becoming a party to it a corporation surrendered its business to the Sugar Refineries Company, and so forfeited its charter. (*Id.*, p. 83.)

XXX

It results from the relations of the corporations to the Sugar Refineries Company that the former are subject to the absolute control of the latter by virtue its power to vote their stock and to appoint their trustees.

"It cannot be denied that the appellee, as owner of the majority of the shares of stock of the companies, can control them in the exercise of all their corporate powers, through a board of management of its own selection." (People *vs.* Chicago Gas Trust, *supra.*)

If, then, it be to the interest of the combination to stop the operations of particular refineries, the board, we may be sure, will arrest their operations. But, as the price of sugar, and so the profits of the combination, can be augmented only by diminishing the supply of sugar, it follows that the power of the board, actuated by interest, will be exerted to discontinue or to lessen the production of refineries.

And so it was *ultra vires* and contrary to public policy for the corporations to subject themselves to this destroying power of the board.

"The right of incorporation conferred under the general law, is in the nature of a contract. In return for the powers and franchises granted, the corporation is placed under obligation to perform certain duties to the public, and it cannot, without the consent of the other party to the contract, absolve

itself from its obligations." (Abbott *vs.* R. R. Co., 80 N. Y., 27.)

"The privileges awarded to the four gas companies under their respective charters, were given them in return for, and in consideration of services to be rendered by them to the public. The public duty is imposed upon each company separately, and not upon the four when combined together. Each for itself, when it accepted its articles of association, assumed an obligation to perform the objects of its incorporation. But, the appellee, through the control which it does or may exercise over the companies by reason of its ownership of a majority of stock, renders it impossible for them to discharge their public duties, except at the dictation of an outside force, and in the manner prescribed by a corporation operating independently of them. The freedom and effectiveness of their action are seriously interfered with, if not actually destroyed. A power whose exercise leads to such a result cannot be lawfully entrusted to any corporate body." (People *vs.* Chicago Gas Trust, *supra.)*

XXXI

Defendant has forfeited its charter, by procuring and permitting its management to be conducted in another interest than that of its own stockholders.

"It is the duty of the corporate management to conduct the affairs of the corporation in the interests of the shareholders *as such,* and the management is not justified in promoting the outside interests of a

majority of shareholders in disregard of the interest *in the corporate enterprise* of ever so small a minority." (Taylor on Corp., Sec. 558; Milbank *vs.* R. R. Co., 64 How., 29.)

But here, obviously, the management of defendant corporation is controlled, not by its own proper and peculiar officers, but by the central and supreme syndicate; and this syndicate represents not the special interests of defendant's stockholders, but the general interests of the confederated corporations.

The holders of trust certificates are not *ipso facto* and necessarily owners of the corporate stock; certificate holders and stockholders are not identical. The certificates pass from hand to hand, and their transfer involves no assignment of the corporate stock. No certificate holder is owner of stock in any specific corporation. The holder of a trust certificate is interested in the welfare of no particular corporation, but only in the aggregate earnings of the combined corporations. But, the interest of the combination may be inconsistent with the interest of an individual corporation; for the profits of the combination are increased by the restriction of production, and restriction of production implies suppression of particular corporations. Hence, by means of the control of the board over each corporation, the interest of any corporation and its stockholders may be sacrificed to the general interest of the combination.

If it be answered that a certificate holder whose scrip is a substitute for stock in a suppressed and

idle corporation is compensated by the increased dividends of the combination, then it appears that the earnings of a profit-producing corporation are appropriated, not to those who own the capital of which the profits are the product, but are divided with stockholders of other corporations.

In a word, by operation of the system, each corporation shares the losses and partakes the profits of every other corporation.

Indisputably, it is in the general interest of the combination, and not for its own special benefit and aggrandizement, that defendant corporation is conducted.

But a corporation is "bound to apply its funds for the purposes directed and provided for by the act of incorporation, and for no other purpose whatever; and a contract to do something beyond is an illegal act." (Pearce *vs.* R. R. Co., 21 How. U. S., 443; Berry *vs.* Hayes, 24 Barb., 212; East Anglia, &c., *vs.* Ry. Co., 7 Eng., L. & Eq., 505.)

XXXII

By the transfer of defendant's stock to the Sugar Refineries Company, "subject to the purposes of this deed," the law forbidding the suspension of the absolute ownership of personal property was violated.

1.—The board of the "Sugar Refineries Company" holds the stock of the several companies by a tenure which constitutes an illegal perpetuity.

The board do not hold the stock as owners; in

terms they hold it only "as trustees." There can be no purchase without a price; and the board neither paid nor promised a dollar for the stock. The certificates they issued are merely evidence of the holders' title to the stock, and right to the receipt of a dividend on it.

2.—Holding the stock as trustees they hold it in perpetuity; for there is no limit of time to their tenure, and neither they nor the certificate owners can dispose of the stock. (Gould *vs.* Head, 38 Fed. Rep., 886.)

3.—The statute provides that "the absolute ownership of personal property shall not be suspended for more than two lives." (1 Edmonds' Stat. (2d Ed.), 727.)

4.—And this provision is to conserve an essential interest of public policy.

"A perpetuity is a thing odious in the law and destructive to the commonwealth; it would stop commerce and prevent the circulation of property." (Lord Hardwicke, Ch., in Duke of Norfolk's Case, 1 Vern., 164; 2 Black. Com., 268 *et seq.;* 4 Kent, 287; Fisher *vs.* Bush, 35 Hunt, 643; Will of O'Hara, 95 N. Y., 404, 422; Schettler *vs.* Smith, 41 N. Y., 328.)

Much more in a republic is the free circulation of property the life-blood of the commonwealth; and hence the statutory prohibition of mortmains and entails.

"All experience shows that large accumulations of property in hands likely to keep it intact for a

long period, are dangerous to the public weal. Having perpetual succession any kind of corporation (joint-stock associations) has peculiar facilities for such accumulations. Freed as such bodies are from the sure bound to the schemes of individuals — the grave — they are able to add field to field, and power to power, until they become entirely too strong for that society which is made up of those whose plans are limited to a single life." (Central R. R. Co., 40 Ga., 629.)

5.—The need of a strict and punitive enforcement of the statutes forbidding perpetuity against corporations by revocation of their charters is easily demonstrated, if, indeed, it be not obvious. Every act of incorporation creates, *ex necessitate rei,* a perpetuity in a certain sense. A corporation may be made practically immortal. It may survive a hundred consecutive lives. So long as it subsists it holds and may hold its property, real and personal, from alienations and exchanges. This possibility the law recognizes and has to permit. It, therefore, provides at the outset limitations upon the property-holding capacity of corporations. It, moreover, insists that such property shall be actively used, and that the world outside the corporation shall receive the benefits growing from the use of such property in some form of commerce, investment or production. Hence arise the statutes that provide for the annulment of corporate charters in cases of non-user.

If an individual attempts to impose a perpetuity

upon his property, either by deed or will, there are numerous influences that are immediately brought to bear to procure the destruction of such perpetuity. The interests of heirs and next of kin and creditors are directly asserted to procure the annulment of the illegal instrument. But in the case of a corporation these disturbing causes are in most cases absent. Stockholders, so long as the business of the corporation is attended with profit, will not complain, even if such a disposition of the property of the corporation has been made as is prohibited by the statute. They will rather conspire together and co-operate with each other to uphold the unlawful disposition.

It is not to be believed that the astute and learned minds that devised the scheme put in operation by the trust deed, had forgotten or overlooked the statutes against perpetuities. They proceeded upon the theory that the interests of all the parties to such deed would prevent the question of its legality ever being raised. It was for the advantage of the stockholders and the trustees that the terms of the trust should be carried out. It was inconsistent with the interest of very stockholder to attack the trust and assert its invalidity, but, as an additional safeguard against possible caprice or resentment on the part of stockholders, the scheme of the trust provided that the trust itself should be the stockholder. Whether or not the trust, the Sugar Refineries Company, be in effect a corporation in itself, the main quality of a corporation was imparted

to it — perpetual succession. The attempt was made to give it immortality for the purpose of maintaining an unlawful suspension and perpetuity, and upon the unlawful scheme of suspension the trust itself was made to rest.

It will not aid the contention of the defense to assert that the statute vindicated itself, and that the attempt to create an unlawful suspension was futile, and that none in fact was created, because none could be created.

The stock was actually delivered to the trustees under the deed, and the trustees assumed and entered upon their trust, unlawful though it was. All the parties concurred in the combination and cooperated to make it effective.

The reasoning of Mr. Justice Peckham, in presenting the decision of the Court of Appeals in a recent case, is convincing against the theory that the statute vindicated itself.

" The argument is, the corporation would answer a claim to forfeit the charter by the fact that the charter precluded it from taking such property, and, therefore, as it could not, it had not done so. I do not see the force of the argument. The charter may preclude the rightful taking of the property by the corporation and may prevent the legal title from vesting in it, but that has nothing to do with the fact that, nevertheless, the corporation has, as a physical act, taken the property and may be insisting upon its right to keep it as a matter of law. In such case can there be any doubt that the corpora-

tion has taken and is holding the property as its own, and in defiance of the charter, although the rightful owner of the property may thereafter obtain his own? The fact that he does obtain it is no answer to the other fact that the corporation had taken it, nor is it any legal answer to the claim of forfeiture of the charter on the part of the State, that it was unsuccessful in continuing to hold the property against the charter provisions." (In the Matter of McGraw, 111 N. Y., 106.)

Wherefore, the only possible procedure by which the statute against perpetuity can be enforced in this case, and the policy of the law vindicated, is an action by the People, not to set aside the trust deed, for the People have no property interests that would warrant such a suit by them, but an action to annul and dissolve the corporation, under the statute.

C

The judgment should be affirmed.

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